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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
TERRITORY OF DAKOTA,
FROM THE MAY TERM, 1882, TO AND INCLUDING THE
OCTOBER TERM, 1884.

BY ELLISON G. SMITH,
REPORTER.

VOLUME III.

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JUSTICES OF THE SUPREME COURT
OF THE
TERRITORY OF DAKOTA.
DURING THE TIME OF THESE REPORTS.

Chief Justice.

HON. ALONZO J. EDGERTON.

Associate Justices.

HON. JEFFERSON P. KIDDER.

HON. GIDEON C. MOODY.

HON. SANFORD A. HUDSON.

HON. WILLIAM E. CHURCH.

HON. CORNELIUS S. PALMER.

United States Marshals.

JOHN B. RAYMOND.

HARRISON ALLEN.

Clerks Supreme Court.

B. S. WILLIAMS,

J. A. HAIGHT.

Reporter.

E. G. SMITH.

ALLOTMENT OF THE JUSTICES

OF THE SUPREME COURT OF DAKOTA TERRITORY.

CHIEF JUSTICES.

HON. ALONZO J. EDGERTON. }
HON. BARTLETT TRIPP. } *Second Judicial District.*

ASSOCIATE JUSTICES.

HON. GIDEON C. MOODY. }
HON. WILLIAM E. CHURCH. } *First Judicial District.*

HON. SANFORD A. HUDSON. }
HON. WILLIAM B. McCONNELL. } *Third Judicial District.*

HON. JEFFERSON P. KIDDER. }
HON. CORNELIUS S. PALMER. } *Fourth Judicial District.*

HON. SEWARD SMITH. }
HON. LOUIS K. CHURCH. } *Fifth Judicial District.*

HON. WILLIAM H. FRANCIS, *Sixth Judicial District.*

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
TERRITORY OF DAKOTA.

MAY TERM, 1882.

PRESENT:

HON. ALONZO J. EDGERTON,	CHIEF JUSTICE.
HON. JEFFERSON P. KIDDER,	} ASSOCIATE JUSTICES.
HON. GIDEON C. MOODY,	
HON. SANFORD A. HUDSON,	

WINONA & ST. P. R. R. Co. v. THE COUNTY OF DEUEL, ET AL.

1. **TAXATION: EXEMPTION FROM.** It was within the power of the Legislature of the Territory of Minnesota to exempt railroad lands from taxation until sold and conveyed by the railroad company. And such a provision in the charter of an incorporation constitutes a contract which cannot be impaired by subsequent legislation.

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2. **SAME: DIVISION OF TERRITORY.** And the subsequent division of the Territory of Minnesota does not forfeit or affect such contract rights of the corporation as to taxation of lands situated in that part of the Territory incorporated into the Territory of Dakota.

3. **MERGER:** The corporation mortgaged all its property, franchises, privileges and immunities, including the contract right of exemption from taxation: such mortgage was legally foreclosed, and all such property, franchises, privileges and immunities were bid in by the Governor, and were by him transferred to the State of Minnesota; at the time of such purchase and transfer the lands in controversy had become a part of Dakota Territory; the state regranted such property, franchises, privileges and immunities to plaintiff; it being admitted by the pleadings that the State of Minnesota intended to hold and regrant without merger or extinguishment all the mortgaged property, franchises, privileges and immunities; *held*, that the right of immunity from taxation as to such lands was not merged, but was conveyed to and acquired by the plaintiff corporation.

Appeal from the District Court of Deuel County.

The facts are fully stated in the opinion of the Court.

Parsons & Runnells, for defendant and appellant.

POINTS IN BRIEF: As to the effect of the grant by the territory of Minnesota to the Transit Company, we suppose that beyond the first one hundred and twenty sections, it was only to give it title *pari passu*, as the lands were earned. That not having title to these lands, Section four of the Act providing for immunity from taxation never became operative; *Farnsworth et al v. Minn. & P. R. R. Co.*, 2 Otto, 65; *Schulenberg v. Harriman*, 21 Wal., 59; *C. R. & M. R. R. Co. v. Carroll County*, 41 Iowa, 153.

CONCEDE: 1. That the lands would have been exempt from taxation in the hands of the Transit Company.

2. That the grant to the Company was a *contract* within the meaning of the Constitution of the United States and of the State of Minnesota.

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The territory of Minnesota received the lands from the general Government in trust. It granted them in trust; its grantee failed to perform the conditions of the grant, both to it and the territory, and thereupon the territory, which had then become a State, took the lands back.

What then, is there by which the State can say that it has thrown off its character as *Trustee*, and put on that of owner?

As the trust was political rather than judicial, it might have held the lands and not have executed it; but when it parted with the title, its grantee could only acquire title in accordance with the terms of the grant. To this effect we understood *Farnsworth v. R. R. Co.*, and many other cases.

While the lands were held by the State as trustee of the general Government they would not be subject to taxation *wherever situated*; so long as held by it in any character, those within its own borders would not be subject to taxation; and the fact that it purchased them under a foreclosure against one who held them exempt from taxation would not affect the question. To this effect is *Trask v. Maguire*, 18 Wall., 391.

The question then is: Could the State of Minnesota, at the date of its grant to *plaintiff*, March, 10, 1862, by contract or legislative grant bind the Territory or future State of Dakota?

We submit that *ipso facto* upon the organization of the territory of Dakota, March, 2, 1861, all the lands within its territorial limits not exempt from taxation by the laws of Congress became immediately subject to such laws as Dakota might pass upon the subject, unless there were *then* valid outstanding contracts which it had inherited from the parent territory of Minnesota; and that as to such contracts it was bound to such obligations only as were then existing, and that it was not competent for the territory of Minnesota at any time after it had ceased to have legislative power over the territory of Dakota, to renew, modify or extend such obligations.

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3. Assume that in all the foregoing we are in error; what then, was the effect of the foreclosure?

We should answer, it reinvested in the State the rights of *property* with which it had parted, and extinguished all contract rights which its grantee, by its purchase had acquired. If this is not true we have the anomaly of an existing contract *with but one* party. That this could not be so as to individual contracts admits of no argument; if it may be so as to a state it can only be upon the idea that states and parliaments are not only omnipotent, but impersonal. To give it this effect certainly requires legislative as distinguished from contracting power, which brings us again to the question whether the territory of Minnesota could legislate by acts having only a future effect, so as to bind a succeeding sovereignty, and create rights, not *present*, but to arise in the future, which should survive the extinguishment of the contract of which they were a part.

We may safely assume that the contract with the Transit Company would have been at an end by the forfeiture and foreclosure if it had not been kept alive by some other act or agreement.

What was that act or agreement, and what power had the party making it, *at that time*.

I suppose the answer to be, *the act of August 12, 1858*.

There can be we submit, but one answer as to the power which the State of Minnesota then had. *It was precisely such, and no other or greater, as a private individual, acting as the trustee of the general government, would have had.*

Its powers of sovereignty as to these lands were at an end. It could sell or dispose of them as provided by the act of congress, as an individual might have done. It could grant privileges and immunities as against itself, but beyond its own territorial jurisdiction it was as powerless to grant immunities as to these lands against the territory of Dakota, as it would have been over the government buildings in the District of Columbia.

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Among the cases that settle or recognize the principles that we concede to be favorable to the plaintiff, are: *Railroad Company v. Reid*, 13 Wall., 264; *Humphrey v. Pegues*, 16 id., 244; *Morgan v. Louisiana*, 3 Otto, 217; *Railroad Co., v. Gaines*, 7 id., 697; *Railroad Co., v. County of Hamblen*, 12 id., 273; *Railroad Co. v. Commissioners*, 13 id., 1; *Wilson v. Gaines*, 13 id., 417.

None of these cases, we submit, go in any respect beyond what we have conceded, and through all of them runs the thought, that exemption from taxation, being an immunity from the general rule, should be clearly made out by the party claiming the exemption. Among the cases which we think somewhat favorable to us are: *Rice v. Railroad Co.*, 1 Black, 361; *Thompson v. R. R. Co.*, 7 Wall., 590-91; *Trask v. Maguire*, 18 id., 391; *Schulenberg v. Harriman*, 21 id., 44; *Farnsworth v. Railroad Co.*, 2 Otto, 49; *Merriwether v. Garrett*, 12 id., 472.

Thomas Wilson for plaintiff and respondent.

As it cannot be questioned but that it is competent for the Territory or State by which such corporation is created and in which it exists, to authorize it to mortgage all its property, franchises, privileges and immunities, the single question in this case would seem to be whether a mortgage of the "*property, franchises, privileges and immunities*" of the Company carried and covered the privilege or immunity of exemption from taxation.

This question must be answered in the affirmative whether we consider the natural and ordinary signification of the terms used or the decisions of the highest courts of the United States and different States. See *L. & N. R. Co. v. Gaines*, 3 Fed. Rep., 266; *Humphrey v. Pegues*, 16 Wall., 244; 16 How., 369, 380, 382, 387, 390; 8 Wall., 420; 13 Wall., 264; 20 Wall., 36; *Morgan v. Louisiana*, 93 U. S., 217; *R. R. Co. v. Gaines*, 97 U. S., 697; *St. Paul & Pac. R. R. Co. v. Pucker*, 14 Minn., 297, 329; *State*

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v. W. & St. P. R. R. Co., 21 Minn., 315; *State v. Trustees, &c.*, 21 Minn., 344; *Railroad Co. v. Hamben*, 102 U. S. 273; *Railroad Co. v. Comr.*, 103 U. S., 1.

It is not claimed that any law of the State of Minnesota affects or could affect the rights of the Territory of Dakota. The law of the Territory of Minnesota, of which Dakota was then a part, exempted these lands from taxation for a valuable consideration to it paid therefor. The law was and is a contract, the obligation of which cannot be impaired by subsequent legislation, as the authorities above cited clearly show.

Whether the law of the State authorized the State, or the Governor for the State, to bid in at the mortgage sale the "lands, franchises, privileges or immunities" mortgaged by the Transit Railroad Company, and to hold the same without merger or extinguishment and to regrant them, is a question that did not touch the interests or rights of the Territory of Dakota any more than would a law which had authorized a married woman, minor or trustee (for the benefit of his *cestui que trust*) to purchase, hold and sell such property. That is a question of State policy, which did not make, or tend to make, the lands taxable, or exempt from taxation. The rights of the Territory as to the taxation of these lands, are not different from what they would be if a natural person had purchased instead of the State.

When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded *hac vice* as a private person itself, and is, as to that transaction, to be so treated and considered: *Hall v. Wisconsin*, 103 U. S., 11; *Davis v. Gray*, 16 Wall., 232; *Curran v. State of Ark.*, 15 How., 308, 309; *St. Paul & Pacific R. R. Co. v. Parcher*, 14 Minn., 303, 304, 329, 330; *U. S. Bank v. Planter's Bank*, 9 Wheaton, 906, 907.

The question of merger is one purely of intention declared or presumed. Therefore it is competent to refer to the acts of the Legisla-

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ture of the State of Minnesota to show whether it did intend to hold the franchises and privileges without merger or extinguishment or not: *Davis v. Pierce*, 10 Minn., 378; *Horton v. Moffitt*, 14 Minn., 293; *Railroad Co. v. Parcher*, 14 Minn., 304.

That the exemption from taxation conferred by the laws above referred to is a *contract right*—a right which the Legislature in the absence of constitutional inhibition is competent to grant, and which is inviolable, is no longer an open question. *Railroad Co. v. Parcher*, 14 Minn. 326; *Davis v. Gray*, 16 Wal. 232, and other cases cited in fourth subdivision of brief.

This being so, and the plaintiff (and its predecessors in interest) having in all respects performed on its part, it would be shocking to our sense of justice and at variance with the most clearly settled fundamental principles, to deprive it of the rights secured by the contract and paid for.

The construction of the State Courts of its own Statutes and Constitution is conclusive on the U. S. Courts and Courts of other States and Territories. *Falckner v. Hart*, 82 N. Y., 421; *Jessup v. Carnegie*, 80 N. Y., 441, 447, and cases cited; *Hunt v. Hunt*, 72 N. Y., 236, 237, and cases cited; *Walker v. State Harbor Com.*, 17 Wal., 648, 650, 61; *Secomb v. R. R. Co.*, 23 Wal., 108, 117; *Town of South Ottawa v. Perkins*, 94 U. S., 266, 267; *Peik v. Chicago Railroad Co.*, 94 U. S., 178; *County of Leavenworth v. Barney*, 94 U. S., 71; *Adams v. Nashville*, 95 U. S., 21; *Township of Elginwood v. Marcy*, 92 U. S., 289, 294 ; *The Bark Prince Alexander*, 8 Benedict 209 ; *Fairfield v. County of Gallatin*, 100 U. S., 47, 51, 52 ;

That the grant of lands to the Territory of Minnesota and by the Territory to the Transit R. R. Co., were *grants in presenti* is now well settled. *Schulenberg v. Harriman*, 21 Wal., 60, 62 ; *Lawrence R. Co. v. U. S.*, 92 U. S., 739, 741, 742, 748, 749 ; 9 Opinion of Attorney General, 254-5 ; *French v. Fegan*, 93 U. S., 169, 170 ; *Cent. Pac. R. v. Dyer*, 1 Sawyer 642, 651 ;

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The appellant not having brought up the evidence on which the Court below found the facts, and decided the case, all presumptions not absolutely unreasonable are against the appellant, and in favor of the respondent. *Veile v. T. & B. R. Co.*, 20 N. Y. 184, 186; *People v. Whitney*, 53 Cal., 420, 421; *Grant v. Morse*, 22 N. Y., 323, 324; *Brant v. Turner*, 47 N. Y., 96; *Acker v. Career*, 23 Minn., 567, 568; *City of Allegheny v. Nelson*, 25 Pa. St. R., 332.

KIDDER, J.—This suit was brought to enjoin the enforcement of taxes against certain lands owned by the plaintiff, and which are part of the land grant made by the United States to the Territory of Minnesota to the Transit Railroad Company, to whose rights the plaintiff claims to have succeeded. The plaintiff claims that these lands are exempt from taxation until it sells or contracts to sell them. This the defendants deny.

The facts on which the decision of this question depends are fully stated in the findings of the Court below, the case having been tried by the Court without a jury. The correctness of these findings of facts is not questioned by either party. Indeed, the attorneys for all the parties have expressly agreed to their correctness. The question is, therefore, one of law, pure and simple.

The material facts found and admitted may be thus briefly stated: The Transit Railroad Company, a corporation created by the laws of the Territory of Minnesota, was authorized to construct and operate a line of railroad from Winona, in said Territory, westerly by way of St. Peter to a point on the Big Sioux River south of the 45th parallel of W. latitude—all of which line was within the Territory of Minnesota.

By an Act of Congress approved March 3d, 1857, the United States granted to the Territory of Minnesota for the purpose of aiding in building said line of road every alternate section of land,

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designated by odd numbers, for six sections in width on each side of the line of road, with the right to receive indemnity, &c.

By an Act of its Legislature approved May 22d, 1857, the Territory of Minnesota granted to the said Transit Railroad Company, subject to the conditions in the act expressed, all the interest and estate present and prospective, of the Territory or future State in and to any and all of said lands ; and by the said Act, it was, for the consideration and on the conditions therein expressed, provided and enacted, that the lands thereby granted were, and should be exempt from taxation until conveyed by the said Company. The Transit Railroad Company relying upon the grant to it, accepted the Act and entered upon the building of the line of road. The Transit Railroad Company was one of the "land grant railroads" of the State of Minnesota, and as such received from the State a loan of five hundred thousand dollars, to secure which it issued to the State of Minnesota its first mortgage bonds to the amount of the debt, and granted, bargained, sold, transferred and assigned to certain trustees to be by them held in trust, the entire railroad built or to be built, and "all right, property, "privileges, franchises and immunities of said Transit Railroad "Company of every nature and kind whatever which were then "owned by the said Company, or which should thereafter be "acquired or owned by it, and all right, title, interest or claim "either legal or equitable, which the said Company had or which "it should afterwards acquire in or to any lands under the afore- "said Act of Congress or under any of the Acts of the Territory "of Minnesota above referred to ; and authorized the said trus- "tees, in case the said Transit Railroad Company should fail to "pay the principal or interest as the same became payable, to "enter upon and take possession of all and singular the rights "and interests, property, privileges, franchises and immunities "granted in trust as aforesaid, and to sell and dispose of the same "for the payment of the said principal and interest, as in said.

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“trust deed provided ; and to make, execute and deliver to the
“purchasers a good and sufficient deed of conveyance of the same.
“And, in case of neglect or refusal of said trustees to enter upon
“and take possession of, and foreclose said trust deed, then the
“Governor of the State of Minnesota, was in and by said trust
“deed, authorized to make or cause to be made such sale and
“foreclosure for the purpose aforesaid.”

The Transit Company having made default, and the trustees having neglected and refused to foreclose, the Governor of the State of Minnesota, on the 23d day of June, A. D. 1860, after having given due and legal notice, caused to be sold, at public auction, and did bid in and purchase, for, and in the name of the State, “*all the property, rights, privileges, franchises and immunities pledged in said deed of trust,*” and did, on the 16th day of October, 1860, transfer and convey the same to the State of Minnesota ; * * and the State thereupon claimed and intended and assumed to hold the same without merger or extinguishment. And, on the 10th day of March, A. D. 1862, the State by an Act of its Legislature granted, transferred and conveyed to William Lamb and others, as a Board of directors of the Winona & St. Peter Railroad Company, “*all the property, interest, corporate rights, privileges and franchises of, or which before had belonged to, the said Transit Railroad Company.*”

“The plaintiff has and prior to the assessment of the taxes referred to had, surveyed, located, constructed and completed, and did, within the times and in the manner specified and required by the laws of the Territory and State of Minnesota and the United States aforesaid, survey, locate, construct and complete a line of railroad from Winona westerly on the most feasible route by way of St. Peter, to the Big Sioux River south of the 45th parallel of north latitude, and has, in all respects complied with the several acts of Congress and of the State and Territory of Minnesota in

respect to building of said railroad from Winona westerly via St. Peter to the Big Sioux River and has, in all respects, complied with and conformed to the provisions, conditions, and requirements of the several acts of Congress granting lands to aid in the building of such road."

The Governor of the State in pursuance of the laws of the Territory and State, has conveyed the land in question, to the plaintiff (which are part of the lands granted as aforesaid), and the plaintiff has not sold or contracted to sell them.

The defendants, claiming the right under a law of the Territory of Dakota, have attempted to tax and are about to sell for delinquent taxes these lands.

From these facts two questions arise: 1. Was it within the power of the Legislature of the Territory of Minnesota to exempt these lands from taxation, until they should be sold and conveyed by the Railroad Company, and, if it had such power, did it exercise it?

2. If it had that power and did exercise it, did the plaintiff succeed to this privilege or immunity of exemption from taxation?

I think that both of these questions must be answered in the affirmative, for reasons which I shall briefly state :

As to the power of the Territory of Minnesota to grant such privileges and to bind itself and its successors by its contract to that effect, the question is not new. The following cases are directly in point in favor of the existence of such power: *St. Paul & Pacific Railroad Co. v. Parcher*, 14 Minn., 297; *State v. W. & St. P. R. Co.*, 21 Minn., 315; *State v. Trustees, &c.*, 21 Minn., 344.

These are adjudications under the very acts of the Legislature of the Territory and State of Minnesota here to be considered. On principle it is difficult to see how any other conclusion could be arrived at. The United States had the sole power of legislating over or for the Territory of Minnesota, and it could and did delegate that power to the Territorial Legislature.

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By the organic act of the Territory, it was provided as follows :

"SEC. 4. That the Legislative power and authority of said Territory shall be vested in the Governor and a Legislative Assembly. * * *

"SEC. 6. *And be it further enacted:* That the Legislative power of the Territory shall extend to all rightful subjects of Legislation, consistent with the Constitution of the United States and the provisions of this act ; but no law shall be passed interfering with the primary disposal of the soil ; no tax shall be imposed upon the property of the United States ; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the Legislative Assembly and Governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect : 9 U. S. Stats. at large, 404."

Here is the most ample grant of legislative power. It includes all the legislative power, and extends to *all rightful subjects of legislation*. The only limitation is that the Congress of the U. S. might disapprove of any law, in which case it should be null and void. Not only is the grant of legislative power unlimited, but this proviso implies that, when Congress did not disapprove, it approved and affirmed the laws of the Territory.

This is the letter and spirit of this Statute, and it is in accordance with the understanding of the bar and the bench for over a quarter of a century; and millions—yes, many millions—of dollars have been invested in the State of Minnesota on the faith and belief that the Territorial legislature possessed such power, and we have yet to learn that in a single case the power has been ever questioned.

The Legislature of the Territory of Minnesota having had unlimited legislative power, subject only to the disapproval and veto of its acts by Congress, it is no longer an open or debatable ques-

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tion, that it could grant such privileges, franchises and immunities as the plaintiff claims, and having enacted such a law it became a contract inviolable and irrepealable by any subsequent legislature: *Davis v. Gray*, 16 Wall., 249.

In *Humphreys v. Pegues*, 16 Wall., 249, the Supreme Court of the U. S. employs this language :

“ Another question is raised, to-wit : That a legislature does “ not possess the power to grant to a corporation a perpetual im- “ munity from taxation. It is said that the power of taxation is “ among the higher powers of a sovereign state ; that its exercise “ is a political necessity, without which the state must cease to “ exist, and that it is not competent for one legislature, by binding “ its successors to compass the death of the State. It is too late “ to raise this question in this Court. It has been held that the “ Legislature has the power to bind the State in relinquishing its “ power to tax a corporation. It has been held that such a provi- “ sion in the charter of an incorporation constitutes a contract “ which the State may not subsequently impair. These doctrines “ have been reiterated and reaffirmed so recently as the year 1871, “ in an opinion delivered by Mr. Justice Davis in the case of *The “ Wilmington Railroad v. Read*. They must be considered as “ settled in this Court.” *Wilmington R. Co. v. Read*, 13 Wall., 264; *State Bank v. Knoop*, 16 How., 369, 380, 382, 387, 390; *Pac. R. Co. v. Maguire*, 20 Wall., 36.

Authorities might be multiplied to the effect that such a law is a legitimate act of legislation; that it is not only a law but a contract whose inviolability is guaranteed by the Constitution of the United States.

But it is argued that although the Territory of Minnesota had the power as against itself and the State of Minnesota to exempt these lands from taxation, it had not the power as against the United States or the Territory of Dakota. That as soon as the Territory of Dakota was formed it had the right and power to tax

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these lands—the prior contract of the Territory of Minnesota to the contrary notwithstanding.

As to the United States we have seen that it conferred on the Territory of Minnesota the power to enact such a law subject only to the veto of Congress and that Congress by not disapproving, impliedly sanctioned this very act. There is no basis, therefore, for the suggestion that the Territory of Minnesota, in this respect, attempted or did any thing which was unauthorized or disapproved by or hostile to the United States.

It is not to be lightly supposed that, after a contract like this has been by the permission and authority of the United States entered into, and after it has been fulfilled to the letter on the part of the Transit Railroad Company and its successors and assigns, the United States would deliberately repudiate it or impair its obligation. And it gives me pleasure to add that there is not a word or indication in any act or law of the U. S. which has been called to our attention to justify an intimation or suspicion that it has been guilty of such bad faith.

As to the Territory of Dakota, the contention is that the clause of the constitution of the U. S. which forbids a *State* to pass any law impairing the obligation of contracts—is not applicable to a *Territory*. But this being conceded the defendant's position is not strengthened thereby; for by its organic Act, the Territory of Dakota is expressly inhibited from passing "*any law impairing the rights of private property.*" Rev. Statutes U. S. Sec. 1925. This, as to the Territory, is the equivalent of what the contract clause of the Constitution of the U. S. above referred to, is to the States. That contract rights are property will not be denied.

Nor is it true, that, because the Territory of Minnesota was divided, that the contracts right of the plaintiff, in that part of it which has become incorporated into Dakota, are affected or

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forfeited. The new sovereign in such cases succeeds subject to all property rights before vested. If this were not true, then if the State of Minnesota should be again divided, or if any State should be divided, the rights of private parties might be thus destroyed. The palpable injustice of such a proposition shocks the moral sense. But it can hardly be necessary to further discuss these phases of the case. Property rights are not in this country held by so uncertain a tenure. As we have above seen the Constitution of the U. S. and the organic Act of the Territory of Dakota, expressly forbid and make impossible such confiscation.

But it does not seem to me that the Territory of Dakota has attempted or intended to violate or divest any vested rights. The law by which it is claimed these taxes are authorized is the general revenue law of the Territory, in the enactment of which such cases as this were not considered any more than were government bonds or other exempt property held by private parties.

It is not claimed by the plaintiff's attorney and certainly it can not be allowed that the laws of the Territory or State of Minnesota can have any extra territorial effect or operation. When the law of 1857 which exempted these lands from taxation was enacted, the portion of the Territory of Dakota in which these lands lie was represented in that legislature. It was then a part of the Territory of Minnesota.

That it was intended by that act on the conditions and for the consideration therein expressed to exempt these very lands is clear. The language of the Act will admit of no other construction. It is as follows: "Sec. 2. For the purpose of aiding in the " construction of the railroad, which by this act the Transit Rail-
" road Company is authorized to construct, *all the interest and*
" *estate present and prospective* of this Territory and future
" State in and to *any and all* of the lands granted by the govern-

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"ment of the U. S. to the Territory of Minnesota for the purpose
 "of aiding in the construction of a railroad * * * together
 "with all and singular the rights, privileges and immunities
 "conferred or intended to be conferred upon said road by said
 "Act of Congress, are hereby granted to and vested in said Transit
 "Railroad Company. * * * Sec. 4. The said lands so granted
 "shall be and are exempted from all taxation." etc.

And as said by the Supreme Court of the U. S. in a like case:
 "If the contract is plain and unambiguous and the meaning of
 "the parties to it can be clearly ascertained, it is the duty of the
 "Court to give effect to it the same as if it were a contract between
 "private persons without regard to its supposed injurious effects
 "upon the public interests." *Pacific R. Co., v. Maguire* 20
 Wall., 43.

And it may be added that the consideration paid by the Railroad
 Co., for this immunity was ample, and as it is conceded by the
 pleadings, has been fully paid and performed according to agree-
 ment. A railroad was thus secured, at a great expense, in advance
 of settlement, into this country. And there is not one word of
 evidence in the case, or a fact found or admitted to indicate that
 the conduct of the railroad company, in this affair has not been
 characterized by good faith.

The grant of these lands by the U. S. to the Territory of Minne-
 sota was *in presenti*—it operated to vest an immediate title in
 the Territory; *Schulenberg v. Harriman*, 21 Wall., 60, 62;
Lawrence & L. R. Co. v. U. S., 92, U. S., 741, 742, 748, 749;
Grinnell v. Railroad Co., 103 U. S., 739, 742; 9 Opinion of
 Attorneys General, 254-5; *Newhall v. Sanger*, 92 U. S., 761-2-3;
Cent. Pac. R. Co. v. Dyer, 1 Sawyer, 642, 651-2; *Mo. K. & T.*
R. Co. v. Kan. Pac. R. Co., 97 U. S., 491.

And the Territory had the right to appropriate them for the
 purposes expressed in the Act of Congress. It did not attempt to

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dispose of them or grant them for any other purpose. On the contrary, the proviso in Section 2, of the Act of the Territorial Legislature of May 22, 1857, granting the lands to the Transit Railroad Company is in these words: "Provided that the said lands shall be exclusively applied to and used by the said Transit Railroad Company in the construction of said railroad from Winona via St. Peter to a point on the Big Sioux river south of the 45th parallel of north latitude, and shall be disposed of only in the manner prescribed in said Act of Congress, approved March 3, 1857, and shall be applied to no other purpose whatsoever."

It may be admitted that it was not competent for the State to grant those lands to the Transit Railroad Co., absolutely and without reference to the performance of those acts which were made by the Act of Congress a condition precedent to such right of disposition.

As we have seen, no such thing was attempted. If the Act of the Territorial Legislature did not operate as an unconditional grant, it was at least a valid contract with the Railroad Company that it might earn the lands. As such it was in strict accordance with the Act of Congress and in pursuance of its provisions and in furtherance of its policy.

This is the very course which has been generally—I believe uniformly—pursued in all such cases, not only in Minnesota, but in the several western states, to which such grants have been made, as the statute laws and the reports of their courts show.

The legality and propriety of such a practice is recognized by the decisions of every western state, as it is also in the last case cited from Supreme Court U. S. (*Grinnell v. Railroad Co.*, 103 U. S., 742.) The cases cited by the defendant's counsel, and which, it is claimed, held a contrary doctrine, are not in point. They merely hold that the State or Territory to which the grant is

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made cannot transfer the lands except subject to the conditions and limitations imposed by Congress; which is admitted.

In the cases cited by defendant's counsel, the attempt was made to dispose of the lands without the building of a single mile of road. In other words, it was attempted to dispose of the lands in violation of both the letter and spirit of the law. It was held that this could not be done: *Schulenberg v. Harriman*, 21 Wall., 59; *Railroad Co. v. Carroll County*, 41 Iowa, 153, 162, 163. But it certainly does not follow that it is not competent for the legislature to make a binding contract with any person or company *to comply with and fulfill the objects and purposes of the land grant acts*. It is not expected in such cases, nor would it be desirable, that the State or Territories to which such grants are made should themselves build the roads, and as the lands can be used only to aid in building the road, it must be competent for such State or Territory to contract with some corporation or person to do the work. And of course if it has the power to do this it has the power to make a binding contract that, on the performance of the conditions specified, the Railroad Company shall become entitled to the bounty of Congress; and such other conditions as may be agreed upon.

This being so, these lands were clearly exempt from taxation while they were owned by the Transit Railroad Company. We are led, therefore, to the consideration of the second question in the case, namely: Did this plaintiff succeed to the immunity from taxation possessed by the Transit Company?

This is denied by the defendant's counsel. But after a most careful consideration of his very able argument, I am not able to assent to his conclusions.

It cannot be questioned but that it is within the power of a State or Territory (in the absence of any limitation of its power) by which a railroad corporation is created, to authorize and

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empower such corporation to mortgage its property, franchises and immunities of every nature and kind. This is elementary law and the authorities above cited clearly declare it. Indeed, we believe it is not denied by the defendant's counsel that the Transit Railroad Company had such power.

Hence we have this state of facts: The trust deed or mortgage made by a party (which owned the property) conveyed in trust "*all the rights, property, privileges, franchises and immunities of the Transit Railroad of every nature and kind whatever which were then owned by the said Company, or which should thereafter be acquired or owned by it,*" * * and authorized the trustees therein named in case the Transit Railroad Company should fail to pay the principal or interest of said State bonds or of said first mortgage bonds, * * "*to enter upon and take possession of all and singular the rights and interests, property, privileges, franchises and immunities granted in trust as aforesaid, and to sell and dispose of the same,*" etc.

The default which justified the foreclosure, and the legality of the foreclosure are not questioned. And it is admitted that the Governor who acted instead of the trustees named in the mortgage or deed of trust (as he was by law authorized to do) did in fact, bid in and transfer to the State "*all the property, rights, privileges, franchises and immunities pledged in said deed of trust;*" and that the State subsequently conveyed to this plaintiff "*all the property interests, corporate rights, privileges, and franchises of or which before had belonged to or were owned by the Transit Railroad Company.*"

And all this was done while a law was in force which expressly provided that the purchaser at such sale should succeed to and "*acquire thereby and shall exercise and enjoy thereafter all the same rights, privileges, grants, franchises, immunities and advantages in and by said mortgage and trust deed enumerated*

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“and conveyed, which belonged to and were enjoyed by the company making such deed or mortgage, * * as fully and absolutely in all respects as the incorporators, shareholders, officers and agents of such company might, or could have done thereto—fore had no such sale or foreclosure taken place.”

Here is a clear and apparently perfect chain of title from the owner to this plaintiff. It was not on the argument questioned, but that a grantee or purchaser, at a mortgage or execution sale of “all the property, privileges franchises and immunities,” or of “all the property, franchises and privileges” of such a corporation obtains and succeeds to the privilege or immunity of exemption from taxation which the grantor, mortgagor or execution debtor may have possessed.

And, if this was not admitted, the proposition is no longer open to question or doubt. See, *Q. & N. R. Co. v. Gaines*, 3 Fed. Rep., 266; *Humphreys v. Pegues*, 16 Wall., 244; *St. Paul & Pac. R. Co., v. Parcher*, 14 Minn., 297; *State v. W. & St. P. R. Co.*, 21 Minn., 315; *State v. Trustees*, 21 Minn., 344.

Though in each of the following cases the exemption from taxation was denied, it is conceded that, if the language which is used in this case had been used in those the purchaser, at mortgage or execution sale, would have taken and acquired the privilege or immunity of exemption from taxation. *Morgan v. Louisiana*, 93 U. S., 217, 224; *Railroad Co. v. Gaines*, 97 U. S., 697, 711, 712; *Railroad Co., v. Hamblen*, 102 U. S., 273; *Railroad Co., v. Commissioners*, 103 U. S., 1; *Wilson v. Gaines*, 103 U. S., 417.

But defendant's counsel claims—and I believe this is the point principally relied on—that though the Transit Co., may have mortgaged all its property, franchises, privileges and immunities including the privilege of exemption from taxation, and though that mortgage may have been legally foreclosed and all the rights,

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property, privileges, franchises and immunities bid in by the Governor and by him transferred to the State, yet that the immunity from taxation became extinguished or merged when transferred to the state. Of course it is familiar law that when the lesser estate and the greater, or the equitable and legal estate meet in the same party, the general rule is that the equitable estate merges in the legal, or the lesser in the greater. But the question of merger is one purely of intention, declared or presumed; and it is competent for the person in whom such estates meet to prevent such merger, and hold, without merger or extinguishment, the lesser or equitable estate. *Davis v. Pierce*, 10 Minn., 378; *Horton v. Moffitt*, 14 Minn., 293; *Railroad Co., v. Parcher*, 14 Minn., 303, 304.

This rule is well illustrated by the case of a person who acquires by assignment, or otherwise, a mortgage on real property, while he owns the fee.

Ordinarily, in such case, the *mortgage interest* would become merged in the fee, and *extinguished*. But to this rule the exceptions are numerous and well understood by every lawyer. In such case, the mortgage interest may be, at the option of the owner of the mortgage, held without merger or extinguishment. And, when it is for his interest to hold it separate, the presumption, in the absence of evidence to the contrary will be that he so intended. See authorities last above cited. It may be argued that it is absurd to hold that a man has a valid mortgage of his own land.

This is technically true. But the law does not favor hair splitting quibbles; but rather seeks to subserve the ends of justice and to effectuate the intention of the parties. This is especially true, when a state is a party or the act of a legislature is to be interpreted, in which case all merely technical rules must yield to the legislative will. It must be borne in mind in such cases that the legislative acts are *laws* as well as *contracts*, and that the

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intent must not be defeated by applying the technical rules of the common law. *Mo. R. Co., v. Kan. Pac. R. Co.*, 97 U. S., 497 ; *Schulenberg v. Harriman*, 21 Wal., 62.

As said by the Supreme Court of the U. S., in the case above cited (97 U. S., 497). "*The rules of the common law must yield in this as in all other cases, to the legislative will.*"

It is admitted by the pleadings in this case and found as a fact, that the state of Minnesota intended to hold and regrant, without merger or extinguishment all the lands, property, franchises, privileges and immunities which the Transit Railroad Company owned or possessed, and, in my judgment, according to the rule laid down by the Supreme Court above, this intention must prevail in this case. See *Railroad Co. v. Parcher*, 14 Minn., 303, 304, 329, 330; *which is an adjudication on this very question.* See also, *State v. W. & St. P. R. Co.*, 21 Minn., 315.

Nor have I been impressed by the force of the argument of defendant's counsel that because the state of Minnesota is the creator and grantor of the franchises, immunities and privileges which it acquired and assumed to regrant as aforesaid, it can not hold them without merger as a natural person might.

The answer to this seems plain. Not only, as before said the will of the legislature in such cases, as in all cases must prevail ; but, when a state descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is as to that transaction to be so treated and considered. *Davis v. Gray*, 16 Wal., 232 ; *Curran v. Arkansas*, 15 How., 308, 309 ; *St. Paul & Pac. R. Co., v. Parcher*, 14 Minn., 303, 304, 329 330 ; *U. S. Bank v. Planter's Bank*, 9 Wheat., 906, 907.

Besides, as to the franchises, immunities, etc., pertaining to that part of the lands in this Territory, the doctrine of merger which was argued and decided in the cases in Minnesota, is

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wholly inapplicable. When the Governor of Minnesota purchased these lands, the territory of Dakota had ceased to be a part of Minnesota. Within the territory of Dakota, Minnesota had no rights or power, more than any other artificial person.

It could purchase and hold property there, not as sovereign, but as a private person, subject to all the duties, liabilities and taxes imposed on private persons. *In the absence of any law or expression of intention to the contrary*, it might be said as to *lands within the state of Minnesota*, as said by the Supreme Court U. S. in a case hereafter cited. "When the state became "the purchaser, the immunity ceased; the property stood in its "hands precisely the same as any other unincumbered property "of the state, exempt from taxation, not by virtue of any "previous stipulation with the company, but as all property in "the state is thus exempt." *Trask v. Maguire*, 18 Wal., 404.

But, when the state of Minnesota purchased or acquired lands *in the territory of Dakota*, it took and held them as a private party and subject to taxation as the lands of any private party. If these lands are or have been exempt, at any time, from taxation in Dakota, it is because of the immunity granted and guaranteed by the Act of the territory of Minnesota, of 1857, above referred to—not because the sovereign state of Minnesota held them. The state beyond its own limits is not clothed with any of the attributes of sovereignty.

It must not be lost sight of in this case that when the law of the territory of Minnesota was enacted which exempted these lands from taxation they were *within the limits of Minnesota*. Hence as to that part of the now territory of Dakota, the territory of Minnesota had all the jurisdiction which any sovereign has over its own territory.

Hence the case of *Trask v. Maguire*, 18 Wal., 391, is not an authority against the plaintiff in this case, but it seems to be an authority in favor of the plaintiff.

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That was a case in which a loan of State credit was made by the state to a Railroad Co., whose property was exempt from taxation. The company having made default, the state sold its property, franchises, etc., and bid them in, and afterwards regranted them to another company. Mr. Justice Field, in delivering the opinion of the court in that case, uses this language: "The act under which the sale was made, provided that the purchaser of the road should have all the rights, franchises, privileges and immunities which were enjoyed by the defaulting company and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company had possessed, if it were competent for the legislature, at the time under the new Constitution to confer this privilege. The question, therefore, is whether the legislature was competent to grant the immunity claimed."

The court there holds that the immunity from taxation granted to the original Co., having been merged and having ceased to exist, it was not competent to renew it under the Constitution of that state. It was not intimated by the court that it would not have been in the power of the state to prevent such merger by a law to the contrary, or by any expression of an intention to the contrary. And in the absence of such intention, express, or implied, it is well settled that there would, under the circumstances existing in that case, be a merger and extinguishment of the original privileges or franchises granted.

The question, as held by the Supreme Court of the United States in the case last cited, is whether the Constitution and laws of the State authorized it to continue these franchises, etc., without merger or extinguishment.

As we have seen, the highest courts of Minnesota have uniformly and repeatedly decided that the constitution and laws of that state gave this power, and that, therefore, the

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plaintiff succeeded to all the property, rights, powers, privileges, franchises and immunities of the Transit Company. As we have before said, we believe this is sound doctrine and defensible on principle, and by the authorities. But I also believe that the decisions of the Supreme Court of Minnesota, construing its own constitution and laws, are conclusive of the question. To hold that other courts will not follow the decisions of the courts of a state in construing its own constitution and laws, would lead to the most absurd and alarming consequences; *vide* cases cited next below. At the very same time it might be decided that a constitution law, did, and did not authorize a given act, or confer given rights.

A party could never be certain as to his rights under any law until the question had been passed upon by *all* the courts, before which it could be raised. The law certainly does not countenance such absurdities. On the contrary, it is well settled that the construction which the courts of any state may give to the Constitution or statute law of such state, is conclusive on, or, at least, will be followed by the U. S. Courts, and the courts of other states and territories.

Such Construction becomes thereafter a part of the law or Constitution ; *Jessup v. Carnegie*, 80 N. Y., 441, and cases there cited.

This case, and the cases cited in the opinion, clearly and accurately lay down the rule with its exceptions. See also the following : *Hunt v. Hunt*, 72 N. Y., 236, 237, and cases cited. *Walker v. State Commissioners*, 17 Wal., 648, 650, 651 ; *Secombe v. Rail Road Co.*, 23 Wal., 108 ; *Town of Ottawa v. Perkins*, 94 U. S., 266, 267, 268 ; *Peck v. Chicago Rail Road Co.*, 94 U. S., 178 ; *County of Leavenworth v. Barney*, 94 U. S., 71 ; *Adams v. Nashville*, 92 U. S., 21 ; *Township of Elmswood v. Marcy*, 92 U. S., 289, 294.

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The Bark Prince Alexander, 8 Benedict 209 ; *Fifield v. Co. Gallatin* 100 U. S., 47, 41, 52, 54 ; *State Railroad Tax cases*, 92 U. S., 576, 617,, 618.

None of the exceptions to or limitations of this general rule, touch this case. The rule, of course, does not apply in a case on appeal to the Supreme Court of the U. S. from a state court. In such a case it must follow that the appellate court would not be bound by the decision of the court from which the appeal is taken. Or, if contracts, when made, are valid by the laws of the state as then expounded, their validity can not be impaired by subsequent legislation, or the decisions of the courts altering the construction of the law. In other words, as against contracts which are valid when made, a change of decision of state courts will not be allowed by the federal courts to have a retroactive effect. But no exception to the general rule, which would affect this case, has been brought to the attention of the court, and it is not believed that any such could be referred to.

The case of *Secomb v. R. Co.*, 23 Wal., 108, above cited is in point not only on principle, but on the peculiar facts of this case. In that case ejectment was brought by Secombe against the defendant for a lot in Minneapolis, which had been acquired by condemnation of the Minnesota Central R. Co., which was the successor in interest of the Cedar Valley R. Co.

The Cedar Valley R. Co., was one of the Land Grant Railway Companies of Minnesota and its property, franchises, etc., were sold and bid in by the Governor and transferred to the State, which transferred them to the Minnesota Central R. Co., which transferred them to the defendant in that action.

The steps taken to foreclose the trust deed and sell and transfer the property and franchises in that case, were identical with the steps taken in this—and under the same Statute and Constitution.

Secombe claimed in that case, as defendants in this, that, when

the property, franchises, privileges, etc., were bid in by the Governor, they became merged and extinguished; and that, under the Constitution of the state of Minnesota, which then denied to the legislature the right to grant such franchises, or to create a corporation, it was incompetent for the legislature to confer on the incorporators of the Minn. Central R. Co., the corporate franchises or the right to be a corporation. This was true, of course, if the franchises of the first Company became merged and extinguished, when acquired by the State. But the Supreme Court of the U. S. in the case cited page 117, held that it would of course, and without examination follow the decision of the State Court, and it did follow it and decided against the merger and in favor of the right of the state to hold and regrant without merger or extinguishment the franchises, etc., of the first Company. In this it not only followed but cited and relied on *Parcher v. R. Co.*, *supra*.

While I assent to the doctrine laid down by the Supreme Court of Minnesota, in the cases cited, I think that, even if their soundness were doubtful, the cases above cited clearly show them to be conclusive as to the proper construction of the Constitution and Statute laws of that State.

To a proper understanding and decision of this case, certain considerations must not be lost sight of. The forfeiture so called is not a forfeiture of any of the rights, privileges, franchises or immunities granted by the Act of the Territory of Minnesota of 1857, which granted to the Transit Railroad the lands, franchises and privileges aforesaid.

Under and by that Act on the conditions and for the consideration expressed, certain property, franchises and privileges were granted to the Transit Co., among which was the immunity from taxation. The Transit Railroad Company accepted that Act, and it and its successors have strictly complied therewith.

But there are two contracts referred to in the case to which

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the Transit R. Co., was a party. The first was entered into the spring of 1857, by and between the Territory of Minnesota and the Transit Company. The second in the spring of 1859, by and between the State of Minnesota and the Transit Co.

It was under the *former* that the lands were exempted from taxation. That contract has been complied with by the Transit Co., and its successors, and therefore, I believe they are legally and equitably entitled to the consideration stipulated and agreed upon for such performance.

The latter contract was not complied with by the Transit Co. It was under it that the foreclosure referred to was had. But it is wholly immaterial so far as the rights of the parties to the first contract are concerned, or so far as the rights of the Territory of Dakota (which has succeeded as to these lands, to the rights and duties of the Territory of Minnesota) are concerned—whether the latter contract was complied with by either party thereto or not. As to that contract, the state of Minnesota had the legal and equitable right to waive any performance, or to waive a forfeiture on part of the Transit Co., in whole or in part ; or to enforce the contract as against that Company in any manner which to the State might seem best. The judgment of the Court below is, therefore,

AFFIRMED.

Mr. Justice Moody dissenting:

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1. EVIDENCE: PREVIOUS THREATS. Previous threats alone, unaccompanied with any present hostile demonstration either real or apparent, neither justify nor excuse nor mitigate a killing; neither does mere apprehension of future danger.
2. SAME: When, at the time of the killing, the deceased was making no demonstration whatever toward defendant nor any person whom he had the right to defend, and defendant knew him to be unarmed, and the killing was with a deadly weapon, evidence of previous threats by deceased cannot be material for any purpose.

Writ of error to the First Judicial District Court.

The facts appear in the opinion of the Court.

Bartlett Tripp, for plaintiff in error.

Hugh J. Campbell, U. S. Attorney, for defendant in error.

No briefs on file.

MOODY, J.—The defendant (plaintiff in error) was tried and convicted at the August 1881 term of the First Judicial District court for the murder of one Bisente Ortey, killed at the Sioux Indian reservation in 1879.

But one question is presented in this case for the consideration of this Court. It arises upon the ruling of the District Court at the trial in excluding evidence of previous threats made by the deceased against the defendant.

The defendant's counsel upon the trial offered to prove that several hours before the killing, upon the same day, and also upon two or three other occasions on prior days extending back to about a month previous to that time the deceased had threatened the defendant in effect to do him some great bodily harm, and to

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take his life. These threats were communicated: were, according to the offer, made to the defendant in his immediate presence. These offers being objected to and the evidence excluded, hence arises the question for our consideration.

All of the evidence taken at the trial, properly authenticated, is brought to this Court in the transcript.

The rule governing the admissibility of previous threats by the deceased where a deliberate and willful killing with a deadly weapon, as in this case, is proven, may be thus briefly stated, giving the rule the most liberal interpretation favorable to the accused that is given to it by any enlightened court.

When at the time of the encounter the deceased is making such hostile demonstration toward the defendant as to lead him to apprehend that he, the deceased, intends to take his life or to do him some serious bodily harm, then such threats are admissible as evidence to be considered by the jury in determining the reasonableness of such apprehension, or the imminence of the danger to which the defendant is subjected by such hostile demonstration.

And again, when it is important to determine who made the first felonious assault and any doubt whatever is raised by the evidence as to who was the first assailant, evidence of previous threats is admissible and material to be taken into consideration by the jury in resolving such doubt.

But when at the time of the commission of the acts by the defendant resulting in the killing, the deceased was making no demonstration whatever toward the defendant, nor toward any one whom the defendant had the right to defend, and it is made clearly to appear from the undisputed facts proven that the defendant had no ground whatever to apprehend any present danger from the deceased, then such evidence cannot be material for any purpose; and especially would such evidence be properly

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excluded where the killing was with a deadly weapon and the deceased was known to the defendant to be unarmed.

Previous threats alone, unaccompanied with any present hostile demonstration either real or apparent, neither justify nor excuse nor mitigate a killing. Neither does mere apprehension of future danger.

I do not undertake to give the rule of admissibility of this character of evidence with that rigidity against the accused adhered to by many of the ablest and most enlightened courts. The case under consideration does not require it.

The Supreme Court of California hold this language in *People v. Scoggins*, 37 Cal., 683. "A person whose life has been threatened by another, whom he knows or has reason to believe has armed himself with a deadly weapon for the avowed purpose of taking his life or inflicting a great personal injury upon him, may reasonably infer when a hostile meeting occurs that his adversary intends to carry his threats into execution. The previous threats alone however, unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party. There must be such a demonstration of an immediate intention to execute the threat as to induce a reasonable belief that the party threatened will lose his life or suffer serious bodily injury unless he immediately defends himself against the attack of his adversary. The philosophy of the law on this point is sufficiently plain. A previous threat alone and unaccompanied by any immediate demonstration of force at the time of the rencounter will not justify or excuse an assault, because it may be that the party making the threat has relented or abandoned his purpose, or his courage may have failed, or the threat may have been only idle gasconade made without any purpose to execute it. On the other hand, if there be at the time such a demonstration of force as would induce a well founded belief in the mind of a reasonable person that his adversary was

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on the eve of executing the threat, and that his only means of escape from death or great bodily injury was immediately to defend himself against the impending danger, the law of self defense would justify him in the use of whatever force was necessary to avert the threatened peril. In such a case, proof of the previous threat, and that it was communicated to the defendant would be competent, as tending to show the *animus* of the party, and that the defendant acted upon a well grounded apprehension that his adversary was about immediately to put his threat into execution."

Several persons witnessed the killing in this case and gave evidence of the facts before the court and jury. The defendant was a witness in his own behalf and gave his version of the occurrences. The facts that the deceased was wholly unarmed and known to be so by the defendant, and that he was making no demonstration whatever toward the defendant or any one else, are clearly proven, are not disputed in the evidence, nor in any manner rendered doubtful. It appears the parties were teamsters engaged in driving in the same ox train from Deadwood to Pierre. Their teams were contiguous during the day and upon driving into camp in the afternoon they commenced unyoking their cattle near together; that while so engaged, the defendant in the presence of the "wagon bosses" said to the deceased, "Now I am going to say right here before the bosses that if ever you scare my cattle again" (referring to some previous occasion) I'll beef you." To this the deceased made no reply, but continued unyoking his cattle, and when he had finished, passed near to the defendant; and as he passed him the defendant applied an approbrious epithet to him, which the deceased answered in about the same language. The defendant then said, "You wait a bit and I'll fix you" or "I'll settle it." Then the deceased walked away several steps and sat down on a yoke. The defendant finished unyoking his team, went several

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yards away to a wagon, took out of it a revolver, buckled the belt around him, took the revolver in his right hand, walked back to where the deceased was sitting with his back toward the defendant. As he came near to the deceased, defendant said to him, "you called me" so and so—using vile language. The deceased said, "you called me so first," and as the deceased was in the act of rising from his seat the defendant shot him, the ball striking him in the arm; then as the deceased fled, the defendant fired three other shots, the fatal ones striking the deceased in the back, penetrating and passing entirely through his body, producing death in a very short time.

With these uncontradicted and in no wise doubtful facts, and in view of the fact that the defendant had from the witness stand admitted them, proof of prior threats made by the deceased against the defendant was wholly immaterial. Such threats if proven would neither have justified, excused, nor mitigated the acts of the defendant toward this unarmed and then quiet and peaceful man. There was no doubt from the defendant's own evidence as well as from the evidence of all the witnesses, who made the assault, and that the deceased was making no demonstration of any kind, toward the defendant. Such evidence would not have assisted a defense, for defense there was none.

Its exclusion did not unjustly or unlawfully prejudice the defendant, and no error was committed by such exclusion. The brief reference in the argument to the charge of the judge, related to the same subject, and is covered by the views already expressed.

There being no error in the record, the judgment of the district court is affirmed, and the cause remanded with directions to carry the judgment into effect according to law.

All of the Justices concurring.

United States v. Brave Bear.

UNITED STATES V. BRAVE BEAR.

1. BOUNDARIES OF JUDICIAL DISTRICT: JUDICIAL COGNIZANCE OF: The court will take judicial cognizance of the external boundary lines of its jurisdiction; and that a crime committed at a place on an Indian reservation within such boundary lines, is within the jurisdiction of the court.
2. INDIAN COUNTRY: Executive order reserving a portion of the public domain as an addition to the Sioux Indian reservation: Jurisdiction of crime committed in: Effect of restoring same to public domain. This case affirms the decision of this court in the case of U. S. v. Knowlton, *post*.
3. HOMICIDE COMMITTED PRIOR TO REVOCATION: INDICTMENT SUBSEQUENT. The revocation of the executive order creating such reservation, after the commission of a homicide, and before the indictment has been found, does not deprive the court of jurisdiction to indict and try the defendant for such offense.

Writ of error to the Second Judicial District Court.

The facts are stated in the opinion of the court.

Oliver Shannon, for plaintiff in error.

Hugh J. Campbell, U. S. Attorney for defendant in error.

No briefs on file.

EDGEERTON, C. J. —On December 5th, 1881, the defendant was indicted by the grand jury in the Second Judicial District for the murder of Joseph Johnson, to which indictment the defendant plead not guilty on December 12th, 1881.

The defendant was tried on said indictment, and a verdict of guilty was rendered January 5th, 1882. After overruling motions in arrest of judgment, and for a new trial, on January 9th 1882 the sentence of death was pronounced against the defendant, and thereupon this writ of error was sued out.

The homicide is alleged in the indictment, to have been committed on May 15th, 1879, in the Second Judicial District and territory of Dakota, in the Indian country and in a place and district of country under the exclusive jurisdiction of the United States.

On the trial the judge gave the following charge, *inter alia*, to the jury.

"If the jury find, as a matter of fact, that in May, 1879 the deceased, Joseph Johnson, was murdered by the defendant, and that the place where the murder was committed, was on the east side of the Missouri river, within 20 or 25 miles of Fort Sully, in this territory, and south of the 46th parallel of north latitude, then I charge you as a matter of law, that such a place is within the bounds of the Second Judicial District, and was so on the 15th day of May 1879, and for months before and after that day.

"If the jury find the facts to be as above stated, I also charge you, as a matter of law, that during the year 1879, and up to the month of August, 1879, such place was in the Indian country, and the crime of murder charged in the indictment, if you find such crime to have been committed at the time and place charged, was committed within the jurisdiction of this court.

"And I further charge you, that the subsequent proclamation of President Hayes, of August 9th, 1879, did not oust the jurisdiction of this court, but that it has jurisdiction of this offense, and the place, as charged in the indictment."

To the giving of these instructions the defendant excepted.

The defendant asked the following instructions: "And now January 4th, 1882, the testimony having been closed the defendant, by his counsel Oliver Shannon, requests the court to charge the jury as follows:

"If you believe, under the evidence, that on the 5th day of December 1881, the time of the finding of the indictment by the

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grand jury in this case, that the place of the alleged homicide was not in the body of the said Second Judicial District as averred in the indictment, and further believe from the evidence adduced by the government, that at said date, or before it, that the territory including the place of the alleged homicide, was withdrawn from the Indian reservation, it is your duty to render a verdict of not guilty by reason of a variance between the indictment and the proof," which was refused and the defendant excepted.

The only real question presented is whether the District court had jurisdiction. This may be stated plainly as follows:

At this time, according to the proof, the eastern limit of "said district" was at least twenty-five miles west of the *locus in quo*. The proclamation of President Grant in May 1875, created an addition to the Sioux Reservation, extending some 30 miles east of the left bank of the Missouri river, and included the place of the alleged homicide. In May 1879, the alleged murder occurred. In August following, (1879) the proclamation of President Hayes was issued, abrogating the proclamation of President Grant and restoring the territory, including the place of the alleged homicide, to the public domain; hence the two proclamations left the *locus in quo* at the time the jury found the bill, in the same condition as if no proclamation had been issued. It will be observed that it was some two years and four months after the restoration of the territory to the public domain, under the proclamation of President Hayes, that the grand jury found the bill, to wit., Dec. 5th, 1881.

Thus it will be seen that at the date of the homicide the Second District Court had jurisdiction of the place, it being within the Second Judicial District: and also of the offense, the place being within the Indian country as found by this court in the Knowlton case decided at this term of the court.

In that case the place where the homicide was committed is

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within the boundaries of the additions to the Sioux Reservation made by President Grant's executive order of January 11th, 1875. The defendant was tried in the same court in which this case was tried, at the November term 1881, for an alleged homicide committed on April 10th, 1877, in the same district of territory in which this homicide is alleged to have been committed.

In which case the indictment was found in April 1877, after the proclamation of President Grant of January 11th, 1875, and prior to the proclamation of President Hayes of August 9th, 1879.

It was contended by the plaintiff in error (Knowlton), that the District court had no jurisdiction to try the cause, for the reason that the place where the offense was committed was not within the jurisdiction of the court at the time the offense was committed, and if it was that it ceased to be before the trial, to wit, at the date of President Hayes' proclamation of August 9th, 1879.

This court in that case, decided that the place where the offense was committed was, at the time of the commission of the offense, within the Indian country, within the jurisdiction of the court and that President Hayes' proclamation did not oust the court of jurisdiction.

The only remaining question is, did the District Court lose jurisdiction for the reason that the indictment was not found until after President Hayes' proclamation; We think not. The court says in the Knowlton case, "The commission of murder in the Indian country is still a crime against the United States. The same court now has jurisdiction over that particular place to punish crimes there committed against the United States, the judicial district is the same, the jurors are drawn from the same district of country, and moreover Section 13 U. S. Rev. Stat., expressly preserves the jurisdiction of the court, notwithstanding the repeal of a criminal statute, over an offense committed before such repeal. Certainly no greater effect can reasonably be given to

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this subsequent executive order than should be given to the express repeal of a statute punishing an act as criminal."

The district court therefore properly exercised its jurisdiction in this case.

We see no error in the questions brought before us, and the judgment of the District Court is **AFFIRMED.**

All Justices concurring.

HERBERT V. NORTHERN PACIFIC R. R. Co.

1. **CHALLENGE TO JUROR: ERROR WITHOUT PREJUDICE: PEREMPTORY CHALLENGE REMAINING.** The ruling of the court sustaining a challenge to a juror for cause although not justified by the facts disclosed in his examination, is not error for which a judgment will be reversed when he might have been challenged peremptorily by the same party; and it not appearing that the defendant was prejudiced by such ruling, the cause having been tried by a competent jury.
2. **INJURY FROM NEGLIGENCE OF CO-EMPLOYEE: LIABILITY OF EMPLOYER.** An employer is not liable to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business, and performing services for the same general purposes; but to this rule there are well defined exceptions.
3. **SAME: EXCEPTIONS TO RULE.** One, and perhaps the most important of these exceptions, arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.
4. **SAME: SERVANT RISKS ORDINARY DANGERS OF SUCH EMPLOYMENT.** It is implied in the contract between the parties, that the servant risks the dangers which ordinarily attend, or are incident to, the business in which he voluntarily engages for compensation. But it is equally implied in the same contract, that the master shall supply the physical means and agencies for the conduct of his business; and in selecting such means, machinery and appliances, and in preserving and maintaining them in a suitable condition, he shall not be wanting in proper care. His negligence in that regard renders him liable to an employee who sustains damage in

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consequence of such neglect. Sec. 1130 and 1131 of the Civil Code is an enactment of the common law on that subject and does not change this rule.

5. **SAME: EMPLOYER MUST FURNISH SAFE MACHINERY AND IMPLEMENTS.** The master is liable as for his own neglect in failing to furnish proper and safe machinery or implements, and in failing to keep them in a safe and suitable condition for such use. These duties belong to the master, and he cannot rid himself of responsibility for not performing them by showing that he delegated the performance to another servant who neglected to follow his instructions.
6. **CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** The question of contributory negligence of the plaintiff which would prevent a recovery in an action for damages against a Railroad Company, is generally a question of fact to be submitted to a jury under proper instructions, and when it is so submitted the verdict of the jury is conclusive on that point, hence a refusal to charge the jury that certain acts of the plaintiff at the time the accident occurred constituted negligence and prevented a recovery, was not error.

Appeal from the District Court of Burleigh County.

W. P. Clough, for appellant.

1. The defendant was entitled to the benefit of C. S. Weaver's intelligence, fairness, and sound judgment as a juror in the cause.

His examination upon his challenge did not develop any disqualification growing out of *relationship* to either party, and it absolutely negatived the existence of any *actual bias* towards either party.

The right of a suitor to have his cause heard, and its decision participated in, by a juror who has been properly summoned, called in the panel, found without any disqualification specified in the statutes, and not challenged peremptorily by the opposite party, is indefeasible; and any attempt by the court to deprive him of such right is error, subject to review by an appellate tribunal. *Code Civil Procedure*, Sec. 241-246. *Harrisburg Bank vs. Foster*, 8 Watts, 304. *State vs. Shaw*, 3 Iredell (Law) 532.

2. The plaintiff, at the conclusion of his evidence, had failed

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to make out any cause of action against the defendant, and hence the motion of the latter to dismiss the cause should have been granted. The court should also, at the conclusion of the case on both sides, have granted defendant's request to instruct the jury to find a verdict for the defendant.

The evidence, both at the conclusion of the plaintiff's case, and at that of the case on both sides, showed conclusively the following facts:

Firstly—The defendant was hurt through his own negligence; or,

Secondly—He was hurt through the negligence of his co-employees, engaged in the same general business with him. Among such persons were not only the yard master and car repairer at Bismarck, but also any other employees of the defendant whose business it might have been to keep the defendant's rolling stock in order.

The statutes of Dakota territory throw upon the employee all hazards growing out of the negligence of any other person employed in the same general business, and, in this particular, differ from the common law, as generally interpreted by the courts of the country. *Civil Code*, Secs. 1129-1131. *Hough vs. Ry. Co.*, 100 U. S. 213. *Mich. Cent. R. R. Co., vs. Gilbert*, 9 N. Y. Rep., 243. *Smith vs. Potter*, 9 N. Y., Rep. 273. *Sherman vs. R. & S. R. R. Co.*, 7 N., Y. 155. *Cooper vs. Ry. Co.*, 23 Wis., 671. *Chapman vs. Em. Ry. Co.*, 55 N. Y. 579. *Thompson on Negligence*, pp. 1026-1040.

3. The refusal of the instruction requested in the following words :

“ If the plaintiff knew, or had reason to know, of the broken and defective condition of the car before the accident happened to him, he cannot recover;

—was in the face of a well-settled rule of law. *Thompson on Negligence*, p. 1008, Sec. 15.

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4. The two requests, of similar import, to-wit:

"If the accident resulted to Herbert from the yard-master or car repairer negligently omitting to notify Herbert of the broken condition of the car, in that case the defendant was not responsible for the injury which Herbert had received; and,

"The plaintiff cannot recover from the defendant, by the reason of any acts of negligence on the part of any other persons employed in the same general business with plaintiff. This would include the yard-master and car-repairer;"—were directly in accord with the statutes of the territory. The latter of the two was in almost identical language with the statute. Both requests were entirely pertinent, in view of the evidence; and hence the defendant had a right to one or the other of them being given. See authorities before cited.

5. The motion for a new trial should have been granted, not only on account of the errors upon the trial, which have been above enumerated, but because the verdict was clearly the result of passion or prejudice.

6. The remaining errors assigned need no special comment here. They are mostly all governed by the rules and principles which have been mentioned in one or more of these points.

Thomas Wilson and Wilson & Ball, for respondent; points and authorities cited.

The rulings of the court in respect to the challenges of the jurors were in all respects correct.

But even if the Court erred in allowing the challenge to the juror Weaver, it was error without prejudice, for which this court will not reverse. *Heaston vs. Cin. & Ft. Wayne Ry. Co.*, 16 Ind., 275, 279; *Atchison, T. & S. F. R Co vs. Franklyn*, 23 Kan., 74; *Carpenter vs. Dane*, 10 Ind., 130; *Morrison vs. Love-*

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joy, 6 Minn., 349, 350; *U. S. vs. Cornell*, 2 Mason, 104, 105; *Hobbs vs. State*, 8 Tex. App., 620; *Grisson vs. State*, 8 Tex. App., 386; *McKinney vs. State*, 8 Tex. App., 626; *State vs. Lawler*, 9 N. W. Rep., 698; *Libby vs. Shakespeare*, 9 N. W. Rep., 451; *Atlas Mining Co. vs. Johnson*, 23 Mich., 36; *State vs. Arthur*, 2 Devereux, 217; *Fuery vs. People*, 2 Keys, 442, 443; *Mimms vs. State*, 16 Ohio State R., 221, 228-9; *Irvine vs. State*, 29 O. State, 186; *State vs. Elliott*, 45 Iowa, 486; *Burns vs. Newton*, 46 Iowa, 567; *West vs. Forrest*, 22 Missouri, 344.

It does not appear from the record whether the challenge was for cause or peremptory, and it cannot be questioned but that plaintiff had the right of peremptory challenge.

It is for the defendant to *show error*.

"The court will presume nothing in favor of the party alleging error; but, if compelled through the imperfection of the statement of facts to resort to presumption at all, will not indulge any except such as will sustain the judgment appealed from." *Carman vs. Pultz*, 21 N. Y., 547; *People vs. Whiting*, 53 Cal., 420; *Viele vs. T. & B. R. Co.*, 20 N. Y., 184.

"The party appealing must make his case and have it settled, with such a statement of the facts as will show necessarily that the law is in his favor. If he does not, every intendment not absolutely unreasonable in itself will be against him." *Grant vs. Morse*, 22 N. Y., 324.

"The party who alleges error holds the affirmative in the appellate court, and must be able to show it specifically." *Acker vs. Carver*, 23 Minn., 567; *Brant vs. Trumer*, 47 N. Y., 96.

"The presumption of law is that there was evidence to sustain every fact found; and if the findings are defective, the presumption is that the facts not found were proven." *Dole vs. Anderson*, 27 Cal., 250; *Lyon vs. Lembeck*, 27 Cal., 139.

"The judgment will not be reversed unless it is apparent from

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the record that an error has been committed, and that such error materially injured the rights of the party complaining." *City of Allegheny vs. Nelson*, 25 Pa. St., 332.

Even if all was admitted that the appellant claims, it would not justify the reversal of the judgment. It is not denied but that the defendant had a trial by a fair, impartial jury. On another trial it could have no more than that. It is not in the power of this court to give it a trial by a jury of which Weaver shall be one. All defendant is entitled to is an impartial jury. It has the right to *challenge*, not to *select*. So long as there is no legal objection to the jury which tried the case, it has, in the eye of the law, suffered no injury.

2. The duty of maintaining machinery in proper repair for the protection of employes operating it, *devolves upon the master* and he is liable for injuries resulting from a failure to perform such duty. Even if not expressed, *this is implied in the contract between the parties*.

No act which the master is bound to perform for the safety and protection of his servants can be delegated so as to exonerate him from liability for an injury to the servant, caused by an omission to perform it, and this whether the misfeasance or non-feasance is that of a superior or inferior officer, agent, or servant to whom the doing of an act or the performing of the duty has been committed. *Such act or omission is that of the master*; also, irrespective of the question whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could to secure the safety of the servant. *Fuller vs. Jewett*, 80 N. Y., 46, and cases cited in respondent's brief in that case; *Wharton on Neg.* (2 Ed.), Sec. 210, 211, 212, 224, 232, 232 a, Note; *Ford vs. R. R. Co.* 110 Mass., 240, 255, 256, 260, 261, 262; *Booth vs. Bos. & A. R. Co.*, 73 N. Y., 38, 40; *Drymala vs. Thompson*, 26 Minn., 40; *Lanning vs. N.*

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C. R. Co., 49, N. Y., 521, 531, 532, 533; *Baker vs. All. Val. R. R. Co.* (Sup. Ct. Pa.), 24 Albany Law Jour. 23; *Snow vs. Hous. R. Co.*, 8 Allen 441, 443, 444, 45, 446, et seq; *Woods, master and servant*, Sec. 329, page 687; *Woods, master and servant*, Sec. 398, page 774; 2 *Thompson on Neg.*, 985, 986, 987; *Plank vs. Cent. R. Co.*, 60 N. Y., 607; *Hough vs. Railway Co.*, 100 U. S., 213, 216, 218; *Toledo R. Co. vs. Conroy*, 68 Ill., 561, 567; *C. & N. W. R. Co. vs. Smeet*, 45 Ill., 203; *Cooley on Torts*, 542 et seq. Ib. 560 to 563, and cases cited in note; *Flich vs. Boston & All. R. R. Co.*, 53 N. Y., 549, 553; *Bessex vs. C. & N. W. R. R. Co.*, 45 Wis., 477, 479, 481, 483; *Shaney vs. Androscoggin Mills*, 66 Me., 420, 428, et seq. *Gibson vs. Pac. R. Co.*, 46 Mo., 163; *Lewis vs. St. Louis R. Co.*, 59 Mo., 495; *Cone vs. Del. & Lack. R. Co.*, 81 N. Y., 207; *Holden vs. Fitchburg R. Co.*, 129 Mass., 268; *Slater vs. Jewett*, 85 N. Y., 61, 67, 73, 74; Note to 2 American and Eng. R. Cases, page 56; *Wedgwood vs. R. Co.*, 41 Wis., 482-3; *Smith vs. R. Co.*, 42 Wis., 525-6.

2. This rule does not trench on the rule that the master is not liable to a servant for the negligence of a fellow servant. *The latter rule does not exempt the master from liability for his own negligence.* The negligence is equally actionable whether it consists in originally failing to provide or in afterwards failing to keep its machinery in order. *Fuller vs. Jewett*, 80 N. Y., 46; *Ford vs. Fitchburg Railroad Co.*, 110 Mass., 261; *Bessex vs. C. & N. W. Ry. Co.*, 45 Wis., 481, 482; *Shaney vs. Androscoggin Mills*, 66 Maine, 420, 423 et seq.; *Drymala vs. Thompson*, 26 Minn., 40, and other cases above cited.

3. The company is under obligations to adopt rules for the safe running of its trains. *C. & N. W. Ry. Co. vs. Taylor*, 69 Ill., 461, 465, 466; *Cooper vs. Iowa Cent. Ry. Co.*, 44 Iowa, 135, 138, 139; *Slater vs. Jewett*, 85 N. Y., 61, 73, 74.

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Which defendant wholly failed to do.

4. It is not the province of the court to pass upon the weight or effect of the testimony, but only to determine whether there is *any* evidence to go to the jury. *Wedgwood vs. C. & N. W. Ry. Co.*, 44 Wis., 47.

5. The question of contributory negligence is one for the jury. It is not for the court to say that if plaintiff had an opportunity to observe the defects, and did not, he was guilty of contributory negligence. *Butler vs. M. & St. P. Ry. Co.*, 28 Wis., 501; *Snow vs. Hous. R. Co.*, 8 Allen, 441; *Ford vs. Fitchburg R. Co.*, 110 Mass., 259 et seq. *Besser vs. C. & N. W. Ry. Co.*, 45 Wis., 483; *Stockton vs. Cent. R. Co.*, 79 N. Y., 464; *Plank vs. N. Y. Cent. R. Co.*, 60 N. Y., 607; *Stevenson vs. Jevett*, 16 Hun, 210.

6. The employe is not bound to do more than to raise a reasonable presumption of negligence. *Hackett vs. Middlesex Man. Co.*, 101 Mass., 101; *Wharton Neg.* (2 Ed.), Sec. 427, 428.

7. It is *knowledge, not means of knowledge*, of the defects which prevents an employe from recovering. *Muldony vs. R. Co.*, 36 Iowa 462; *Plank vs. N. Y. Cent. R. Co.*, 60 N. Y., 607; *Snow vs. Hous. R. Co.*, 8 Allen, 441.

8. Plaintiff's exercise of due care may be inferred from the ordinary habits and disposition of prudent men and the instinct of self preservation. *John vs. Hud. Riv. R. Co.*, 20 N. Y., 65, 69; *John vs. Hud. Riv. R. Co.*, 5 Duer 21; *North Cent. R. R. Co. vs. State*, 29 Md., 438; *North Cent. R. R. Co. vs. State*, 31 Md., 364; *Cleveland R. Co. vs. Roman*, 66 Pa. St., 393; *Wis. vs. P. R. Co.*, 79 Pa. St., 381.

The statute of Dakota cited and relied on by appellant's counsel is merely declaratory of the well-settled law on this subject. It neither adds to nor subtracts from the rights or liabilities of the parties. That defendants cars were out of order, and that they became so, not by any accident or sudden injury, but by being worn out, is shown by the evidence.

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The iron-breaking apparatus had worn almost smooth by use. This must have been the work of years.

The following language of the Supreme Court of Wisconsin, in a similar case, is apposite to this:

"We have said the company was under obligations to use reasonable means to guard against defects in its cars. It was bound to exercise reasonable diligence in watching its cars, inspecting them, and keeping them in repair. This duty it owed to its employes. The danger they incurred in entering the service was not to be increased by neglect or failure to perform this legal duty. And if there was defect in the braking apparatus of the car in question, which had existed so long or was of such a character that the defendant, by the exercise of ordinary care, *could have discovered and repaired it*, it is liable for an injury sustained by an employe in consequence of such defect." *Besser vs. C. & N. W. R. Co.*, 45 Wis., 481.

Again, it being shown by the uncontradicted evidence that the machinery furnished by the defendant was out of order and unfit for use, and that that unfitness at least contributed to the injury, it would not be a defense if true that the neglect of a co-servant of plaintiff also contributed to the injury. *Crozier vs. Taylor*, 10 Gray, 274; *Palemier vs. Erie R. Co.*, 5 Vroom, 151; *Joslyn vs. Pearson*, 44 Mich., 160; *Cone vs. Del. L. R. Co.*, 81 N. Y., 207; *Booth vs. Boston & A. R. Co.*, 73 N. Y., 38.

It is not true that a corporation is exempted from liability for injuries resulting from the defective condition of its machinery simply because such defects are, or may be, the result of the negligence of the person having charge of such machinery, and whose duty it is to repair the same.

To allow such an objection to prevail would be equivalent to holding that a corporation is *not liable at all* for its negligence in such cases. As it can only act through its servants and officers, if

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it is not liable for their negligence, negligence cannot be imputed to it. The law does not sanction such an absurdity.

I respectfully ask the attention of this court to the charge given by the court below, either on his own motion or on the request of the attorneys of the parties.

It is the duty of the party taking exception to point out the *particular proposition* or *part* excepted to, so that the attention of the court may be directed to it. *Moore vs. Bank of Metropolis*, 13 Pet., 302, 310; *Lincoln vs. Clafin*, 7 Wallace, 132.

It was competent for the court below to deny a new trial on the condition that the plaintiff would remit a part of the verdict. *Dublin vs. Murphy*, 3 Sanford 19; *Collins vs. A. & S. R. Co.*, 12 Barb. 492; *Blunt vs. Little*, 3 Mason 102, 107; *Murray vs. Hud. R. Co.*, 47 Barb 196; 205; *Kenz vs. Wallace*, 36 Cal., 462, 480, 481; *Doyle vs. Dixon*, 97 Mass., 208, 213; *Seam vs. Conover*, 2 Keys (N. Y.) 113; *Hayden vs. Florence Sewing Machine Co.*, 54 N. Y., 221; *Belknap vs. R. Co.*, 49 N. H., 359. *Collins vs. City of Council Bluffs*, 35 Ia., 432. *Union Roll. Mill Co., vs. Gillen*, 100 Ill., 52.

The facts are stated in the opinion.

Hudson J.—This action was brought to recover damages of the defendant company for causing a fatal injury to the plaintiff's leg necessarily requiring amputation.

It appears from the undisputed testimony in the case that on the 24th day of October, 1879, the plaintiff was in the employ of the defendant as brakeman in defendant's yard at Bismarck, and as such, it was his duty, among other things, to attend, set and loosen brakes when necessary, upon freight trains that came into the yard, in separating and distributing cars, under the immediate direction of the yard master, one Gilboy. That although the plaintiff had had considerable experience as a brakeman at other

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places, he had worked in this yard but two days, when coming up with some cars from the Missouri River landing to the yard at Bismarck, a freight train which had come in from the east was standing upon the track; orders were given to separate and distribute the cars, and for this purpose the switch engine was coupled on and the work of switching commenced.

The plaintiff was ordered by the yard-master of defendant, to brake and stop two certain cars numbered 1804 and 2280, which had theretofore been "kicked off" (as it is termed) and propelled by steam power upon a particular track, and were running toward some stationary cars standing on the same track; That the plaintiff, in obedience to said order, ascended the ladder on the rear end of car 1804, being the hind car, and ran to the forward end and attempted to set the brake attached to said car; That said brake was out of order and could not be made to work so as to stop the said cars, and was utterly useless for that purpose; That as soon as the plaintiff discovered that the brake on said car, 1804, was in bad condition and useless, he stepped on to car 2280 and took hold of the brake on said car for the purpose of braking and stopping said cars. The brake on 2280 is what is termed a "step brake," having its upper bearing of the shaft and dog and ratchet upon a shelf or step about one foot below the top or roof of the car; and the plaintiff in attempting to set said brake stepped down with his left foot upon said shelf or step, it being designed for that purpose, and put his foot against the dog to hold it into the ratchet so as to make the brake effective in stopping the cars, which brought his left limb between said cars. The brake on said car 2280 was also defective and out of order, it having been worn by use, and the ratchet would not hold; That while the plaintiff's left foot was upon the step attempting to hold the dog to the ratchet, the said cars being still in motion struck the stationary cars standing upon the said track.

At the time the train having said cars, No. 1804 and 2280, at-

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tached, came into the said yard at Bismarck, the said car 1804, was broken and defective in other respects than in the brake mentioned; it had met with an accident on its way from Fargo to Bismarck by which the "dead-wood" and "draw-car," sometimes called "bumper," had been pulled out and was then out, and the two cars had been chained together, and were so connected at the time the same were switched off as aforesaid. The two ends so chained together were the ends having the brakes and the end of 1804 having the bumper out; That when car 2280, being forward, struck the stationary cars standing on the track as before described, by reason of car 1804 having no bumper, the two cars were forcibly driven together and coming in close contact, caught, and crushed, and injured the plaintiff's left leg, from which injury amputation became necessary.

There was some evidence tending to show that the plaintiff knew, or had reason and opportunity to know of the defective condition of these cars; but the plaintiff testified on the trial that he had no such knowledge. The defendant also gave evidence upon the trial to show that it had a car repairer at its yard in Bismarck, whose duty it was to repair its cars and to keep them in repair.

Verdict for the plaintiff and judgment from which defendant appeals.

The defendant alleges several errors occurring at the trial in the court below, and to which exception was duly taken; but it is not deemed of importance that all of these should be noticed but only such as were pressed upon the attention of the court by the learned counsel in his argument of the case. And first—it appears that when the cause was called for trial and a jury was being impanelled, one C. S. Weaver was called as a juror and sworn upon his *Voir dire*; that after examination he was challenged for cause by plaintiff's counsel and the court sustained the challenge; to which decision of the court the defendant excepted.

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We need not inquire whether the examination of the juror showed a good cause of challenge, as the question may be disposed of, as far as this appeal is concerned, on other grounds. It does not appear from the record, that the defendant was prejudiced by not having this juror on the panel. The cause was tried by a competent jury. The defendant could not be restored to its rights by a new trial, as it could not have this juror impannelled again. The plaintiff, for aught that appears in this record, might have challenged this juror peremptorily; nor does it appear that the counsel for the defendant had exhausted his peremptory challenges or that he did all that he could to free the panel from objectionable jurors. The panel may have been finally acceptable to him. It is for the defendant to show that it was prejudiced by the decision of the court. A judgment will not be reversed unless it appears that a party's rights have been prejudiced, and as it does not appear that there was any legal objection to the jury which tried the case, the defendant has not in any legal sense suffered injury, and the court will presume nothing in favor of the party alleging error. *Morrison v. Lovejoy*, 6 Minn., 224; *Atlas Mining Co. v. Johnson*, 23 Mich., 36.

Secondly: The defendant insists that the plaintiff cannot recover for an injury caused by the negligence of his co-employee engaged in the same general business, assuming that the evidence shows that the accident which caused the injury to plaintiff was solely from the negligence of his co-employed, viz: the car repairer or yard master.

This is stating a fundamental principle of law, and cannot be disputed, if the defendant's assumption is true. It may be granted that if the case presented in this contention is one falling within that rule of law, and not within any exception to the rule, the defendant ought to prevail. This doctrine of exemption of the common master from liability to his servant for injuries caused by the negligence of a fellow servant engaged in the same general

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employment, is stated by C. J. Shaw in *Farwell v. Boston & Worcester R. R. Co.*, 4 Met., 49, as follows: "He who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is likely to know and against which he can as effectually guard as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any other." In *Lanning v. N. Y. C. R. R. Co.*, 49 N. Y., 521. Folger, C. J., states the law as follows:

"A master is not liable to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow servant engaged in the same general business. Nor is the liability of the master enlarged when the servant who has sustained an injury is of a grade of the service inferior to that of the servant or agent whose negligence, carelessness or misconduct has caused the injury. * * * If they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purposes, the master is not liable."

But the same courts declare that while the general doctrine as thus stated is sustained by elementary writers of high authority and by numerous adjudications of the American and English courts, there are well defined exceptions; which resting as they clearly do, upon principles of justice, expediency and public policy, have become too firmly established in our jurisprudence to be now disregarded or shaken.

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One, and perhaps the most important of those exceptions, arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant when conducting the master's business to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the latter.

It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation.

But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business; nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master, has ordinarily no connection with their purchase in the first instance, or with their *preservation* or *maintenance in suitable condition* after they have been supplied by the master. *Hough v. Railway Co.*, 100 U. S., 213; *Flike v. Boston & Albany R. R. Co.*, 53 N. Y., 549.

This is a comprehensive statement of the common law applicable to the case at bar. But the learned counsel for the defendant cites Sec. 1130 Civil Code of Dakota, and insists that this Sec. places the master and employe under a different rule than the one above stated, and throws upon the latter all the hazards growing out of the negligence of his co-employe. Said section is as follows:

“An employer is not bound to indemnify his employe for losses

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suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe."

But we cannot see that the section of the statute above quoted has changed in any respect the rule of law relating to this subject. It has enacted simply the common law into the statute which cannot give it any more force than it had before such enactment. If the position of the counsel is maintainable then the company could not be held liable for an injury to an employe if the negligence of another employe was at all involved; even "though the company had been mainly in fault, unless the fault was by not using ordinary care in selecting the culpable employe."

If the position of the appellant is upheld in its full extent, it will in most cases relieve a corporate body, and any employer who acts through general superintendents, from liability to servants for injuries occasioned by imperfect and defective machinery, by unsafe mechanical means or appliances of any kind as well as by incompetent and unskillful sub-agents furnished without due care. The next section of the Civil Code clearly shows by the terms employed that an employer is not to enjoy such an immunity from liability as contended for by the appellant. It is as follows: "Sec. 1131—An employer must in all cases indemnify his employe for losses caused by the former's want of ordinary care." We are then brought to the question—What is want of ordinary care in the employer, and when and under what circumstances is he guilty of neglect within the meaning of the law and for which he must be held liable?

This section of the statute is in perfect accord with the decisions which hold that the master is liable to a servant for his, the master's, own negligence, or want of care and prudence, or for his

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own personal act or misconduct, occasioning injury and damage to the servant. And such negligence, want of care and prudence, or misconduct, may be shown in the mismanagement of the master's affairs, in the selection or furnishing of improper or unsafe machinery, implements, or materials for the use of the servant, and his neglect in maintaining and keeping them in a safe and suitable condition for such use. It is claimed by the counsel for the appellant that having provided a car repairer at this yard, whose duty it was to keep the cars and machinery in repair, it was his neglect, and not the company's, that these cars were in a dangerous and unsafe condition.

We understand the principle maintained in the cases cited to be, that there are certain duties which concern the safety of the servant that belong to the master to perform, and he cannot rid himself of responsibility to his servant for not performing them by showing that he delegated the performance to another servant who neglected to follow his instructions or omitted to do the duty entrusted to him.

That the acts which the master as such is bound to perform for the safety and protection of his employes cannot be entrusted to another so as to exonerate the former from liability to a servant who is injured by the omission to perform the act of duty, and in respect to such duty the servant who undertakes to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury. It is sometimes a little difficult to determine how far the master's duty within the rule extends. But in the case at bar there cannot be much uncertainty in that regard. The courts all agree that it is a part of the contract of hire on the part of the master, that he will furnish for the use of his servants, proper, suitable, safe and sufficient machinery and appliances, and keep them in a safe and suitable condition for such use. This is an imperative duty, a failure to perform which renders him liable as for his own neglect. *Cons*

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v. Delaware L. & W. R. R., 81 N. Y., 206; *Bessex v. C. & N. W. R'way Co.*, 45 Wis., 481, 110 Mass., 281; *Fuller v. Jewett*, 80 N. Y., 46; *Drymala v. Thompson*, 26 Minn., 40; *Snow v. Hoosetonic R'way Co.*, 8 Allen, 441; *Flike v. Boston & Albany R. R. Co.*, 53 N. Y., 549.

It is clearly made to appear in this case that the injury to the plaintiff was the result of the broken car 1804, and the defective and useless condition of the brakes upon both cars. The draw-bar and dead wood being out of car 1804, there was nothing to prevent the cars running together upon meeting with resistance. This of itself might not have caused harm to the plaintiff, but the brake on this car 1804 was out of order, defective and could not be made to work; had this brake been in proper condition the cars might have been stopped before reaching the stationary cars on the track, and plaintiff would probably have remained on that car until they were stopped; but this brake upon 1804 failing to work, as it did, the next thing for the plaintiff to do was to step onto car 2280 and attempt to set the brake on that car. That brake was also out of order, and while his foot was upon the dog for the purpose of holding it to the ratchet, the cars striking the stationary cars were forced together, and his leg was caught. Had this brake been in good condition he might still have escaped injury, as his foot would probably have been removed before the concussion. Can we say then that the failure of the defendant to keep these cars, the brakes and machinery upon them in a proper and safe condition for the use of its employes, was not negligence for which it was liable? We cannot upon the law and the facts presented in this record so decide.

The defendant alleges an error the refusal of the court before, to charge the jury as requested by defendant's counsel "that if the plaintiff knew or had reason to know of the broken or defective condition of the car before the accident to him, he cannot recover."

This instruction as a whole could not be given. It assumed that

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if the plaintiff had such knowledge he could not recover under any circumstances; whereas, it is a proper question to go the jury whether the circumstances were such, even having such knowledge, he was himself in fault and for that reason not entitled to recover. But the instruction is not warranted by the evidence, as it is confined to the broken car simply; whereas there were defects in the brakes independent of the injury to the car. Nor could it be given for the reason that "having reason to know or having means of knowledge," is not sufficient to prevent a recovery in any case. It must be actual knowledge to have that effect.

Error is also alleged in the refusal of the court to charge the jury that certain acts and omissions of the plaintiff were negligence, and prevented a recovery, as follows:

That the placing of plaintiff's limb between the cars in question, was not a necessary act but was voluntary on his part, and that his exposure of his limb to this peril was negligence on his part prevents a recovery of damages for the injury which he received. That the plaintiff having from experience the knowledge of the liability of cars thus employed to become broken and disabled it does not appear that he took any particular care to avoid injury from such peril and therefore cannot recover.

The question of contributory negligence on the part of the plaintiff in actions of this kind, has been held by a long line of authorities to be a question of fact for the jury. Negligence is to be determined from all the facts and circumstances attending the case. Certain acts may be negligence under some circumstances and not so under other or different circumstances. *Ford v. Fitchburg R. R. Co.*, 110 Mass., 261, 100 U. S., 225, 19 N. Y., 521, 15 Wall, 401.

It appears from the evidence in this case that the plaintiff immediately previous to the accident, came into the defendant's yard and found the freight train in which were the two cars in question standing on the track. The switching and distributing of these cars

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commenced at once. The plaintiff had worked in this yard but two days. He could not therefore have been very familiar with the other employes, the cars, or the work of the yard. He was ordered by the yard master to brake and stop these two cars at a certain point which evidently required hasty and immediate action; hence the question whether he did know or had reason to know of the broken and defective condition of the cars, and whether he was guilty of negligence or was reckless in acting as he did under these circumstances, were proper questions to be submitted to a jury. *Mehan Administratrix, etc. v. The Syracuse, Binghampton, & New York R. R.*, 73 N. Y., 586; *Hough v. Railway Co.*, 100 U. S. 225.

We find by looking into the record that the court did charge on these points as follows: "If the plaintiff, either from the unusual appearance of the car—as, for instance, its being attached to the next car by chains—or from any statement of the yard master or car repairer, had reason to suppose the car in question was defective or had been broken, it was his duty to take care not to expose his person to injuries which a broken or defective car might cause."

"If the jury believe the evidence of Gilboy, that statements were made by him, in the presence and hearing of plaintiff, that the car was broken, and that it should be taken out and repaired, that was sufficient notice to the plaintiff that the car was defective, and he was bound to take care not to expose his person to injury on account of such defect."

"If the plaintiff was careless, heedless or negligent at the time the injury occurred and such carelessness, heedlessness or negligence materially contributed to the injury, he cannot recover."

"If you find from the evidence that the defendant was guilty of negligence in not providing proper and safe machinery and appliances, in consequence of which neglect the injury was received;

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still if the plaintiff failed to exercise that prudence, care and caution which a prudent man under similar circumstances, ordinarily would exercise, which contributed approximately to the injury, he is not entitled to recover."

The defendant cannot be heard to say in view of these instructions and the finding of the jury upon them that there is any question of contributory negligence for this court to consider. It was an issue raised by the pleadings, and evidence was given to that point by both parties which was somewhat conflicting. Under the decisions of this court the verdict is conclusive upon that issue. *Caulfield, et. al. v. Bogle*, 11 N. W., Rep., 511 and cases cited.

In such a case as the one presented in this record the burden of proof to show contributory negligence was upon the defendant. *Indianapolis & St. Louis R. R. Co. v. Hurst*, 93 U. S., 291; Wharton on Negligence, Sec. 423 and authorities cited; *Railroad Company v. Gladmon*, 15 Wall, 401.

All the questions worthy of notice have now been considered. There being nothing in the case to call for any interference with the result, the judgement of the District Court is

AFFIRMED.

All the Judges concurring.

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1. INDIAN COUNTRY: The term "Indian Country" includes such portions of the public domain as are expressly reserved for the use and occupation of the several bands and tribes of Indians; and which are not included within the jurisdiction of any state or territorial government.
2. RESERVATION BY EXECUTIVE ORDER: The authority of the President to withdraw from sale a portion of the public domain, and set it apart for the use of the several tribes of Sioux Indians, as an addition to their existing treaty reservation, cannot be questioned.

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3. **JURISDICTION EXTENDED OVER:** Such executive order withdrew that portion of the public domain from the operation of the criminal laws of the territory: the trade and intercourse laws were thereby extended over such district of country, and it became Indian country within the meaning of the acts of Congress extending the crimes act to the Indian country.
4. **EXECUTIVE ORDER: REVOCATION OF: EFFECT ON PENDING INDICTMENT:** The revocation of the executive order setting apart such portion of the public domain as an addition to the existing reservation, did not affect the jurisdiction of the court to try defendant, upon an indictment for a homicide, committed in such district of country, pending at the time of such revocation.
5. **IMPEACHING WITNESS: CROSS-EXAMINATION OF:** Where an impeaching witness, on his direct examination, testifies to a part of a conversation, it is error to exclude the rest of such conversation, when material to the case, upon cross-examination; particularly when the balance of such conversation tends to explain the apparently contradictory statements of the witness sought to be impeached.
6. **SELF DEFENSE: APPREHENSION OF DANGER: THREATS: FIRST ATTACK.** Communicated threats serve to put a man upon his guard to protect himself. But a bare fear or apprehension arising solely from previous threats, affords no excuse, unless at the time of the killing some effort, movement or overt act was being made by the party killed to carry such previous threats into execution, and a necessity, real or apparent, existed at the time, for the killing to prevent the accomplishment of such previous threats; and if defendant committed the first aggressive act he cannot claim the benefit of the law of self defense.
7. **APPREHENSION: REASONABLE GROUNDS OF: WHO TO JUDGE OF.** The jury who try the cause, and not the party who kills, are to review and judge of the reasonable grounds of his apprehension and of the imminency of the danger.

Writ of Error to the Second Judicial District Court.

At the April, 1877, term of the Second Judicial District Court, the defendant was indicted for the murder of one David Rauck, alleged to have been committed on April 10, 1877, "in the Sioux reservation set apart by order of the President of the United States, dated January 11th, 1875, near a place in said reservation called Fort Pierre, in said district and territory, which was then and therein the Indian country and within the jurisdiction of this court."

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The cause was tried, and Dec. 27th, 1881, the jury returned a verdict of manslaughter against the defendant.

On the trial the court charged the jury upon the law of self defense as follows:

“Admitting the killing, he contends in court here, that such killing was in self-defense, or in other words that it was excusable or justifiable. Where one person kills another in actual self-defense, the common law declares it to be excusable homicide and not punishable. In general this right exists where one is suddenly assaulted, and in the defense of his person and where immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills his assailant.”

“The right of self-defense is founded on the law of nature, and is a law of necessity, and that necessity must be real or apparently real. Therefore when homicide is committed in the lawful defense of a man’s person and at a time when there is a reasonable ground to apprehend a design to do the slayer some great personal injury and imminent danger of such design being accomplished, such homicide is ranked as excusable (or as the statute of Dakota names it, justifiable.)”

“It must be in *lawful defense* of the person; and defense implies the assailing party, or one who by some overt act, or threatening movement makes the first aggression or attack. If the party killed did not make any such assault or do any overt act or make any such aggressive or hostile movement—in other words, if there was no imminent danger and no reasonable ground for apprehension of great bodily injury, either real or apparent, then the doctrine of self-defense is not available. Two things must concur; first, there must be reasonable ground for apprehension of great bodily harm, and secondly, imminent danger to body or life. Imminent danger means immediate

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“danger, danger quickly to come. When a person, who is without fault himself is *attacked* by another in such manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for his believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be excusable, although it may afterwards turn out that the apprehensions were false, and that there was in fact neither design to do him serious injury, nor danger that it could be done.”

“He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which is subject to be examined into in a court of justice and before a jury.”

“The jury who try the cause, and not the party who kills, are to review and to judge of the reasonable grounds of his apprehension and of the imminency of the danger; that is, whether there was present, immediate, and imminent danger. Communicated threats, if any, serve to put a man upon his guard and to take necessary steps to protect himself. But a bare fear or apprehension arising solely from previous threats, without anything more, affords no excuse—none whatever, *unless* at the time of the killing some effort, movement, or overt act, was being made by the party killed to carry such previous threat into execution, and a necessity, apparent or real, existed at the time for the killing in order to prevent the accomplishing of the previous threats. The defendant alleges and insists generally that the deceased and others with him, came armed into Walpole’s camp, upon that day, with the purpose and avowed intent to forcibly take from him or O’Neil or both of them, the watch and money which had been obtained from the Englishman (so called) that day at an alleged game of “card monte.” And

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“that threats had been made by deceased and others, that if the money and watch were not delivered up, the defendant would be killed. I do not pretend, in this statement of the evidence to give anything more than a general idea or suggestion of the evidence, all of which you will remember. What I wish to say is, that if the defendant had thus obtained the money and watch, or had assisted in obtaining such property, any force used or to be used in getting the property back would be illegal. You, gentlemen of the jury, are to consider all of the evidence in the case, and all the circumstances; and it is your duty to determine what it was that brought the deceased and the others to Walpole’s camp—that is to say, what was really and actually their purpose.”

“The prosecution on the other hand insists that the deceased and the others did not go up there with any intent or purpose to do the defendant any bodily harm; that there is no credible evidence of any such purpose or intent or of any threats; and that if the deceased and the others went up armed, it was in accordance with the habits of such emigrants when encamped among numerous strangers in that section of the country, and at that time, over four years ago.”

“You are to determine all these contested points, and if you should find that the deceased and others did actually go there with the purpose and intent claimed by the defense, then you are to consider all that in connection with the circumstances or surroundings of the defendant at the time of the killing.”

“A man who is in the lawful possession of personal property may resist any attempt to take it from him by force or violence, provided that in such resistance the force or violence he uses is not more than is necessary or sufficient to prevent such attack upon him.”

“But in this case you are to inquire who made the first attack or hostile movement or demonstration; for as I have already stated, threats alone are insufficient, unless there be also some

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“overt or perceivable act or motion on the part of the deceased. You are to examine carefully into all the evidence to ascertain who, just before the killing, did commit the first aggressive or hostile act, for if the defendant did make or commit the first aggressive act or hostile movement, he cannot claim any benefit from the law of self-defense.”

“In such case the deceased himself or the prosecution for him (he being dead) could claim that the deceased, if he afterwards made any movement of his gun, was acting in his own self-defense.”

“In other words if the defendant himself first made an hostile attack or movement or demonstration upon or toward the deceased, the law is that the defendant’s plea of self-defense cannot be available.”

“For as I have already stated the person who claims the protection of the law of self-defense must be without fault himself, and it must be shown, or made to appear that without being the first aggressor or assailant himself, he acted in self-defense upon reasonable grounds for apprehension that some great bodily injury was about to be done to him, and that there was at the time a present and immediate danger, real or apparent, of such design being accomplished.”

The remaining facts necessary to an understanding of the points passed upon by the court, are stated in the opinion.

Bartlett Tripp and Gamble Bros., for plaintiff in error.

Points in brief:

It is only in those places over which the United States has exclusive jurisdiction, that her courts have jurisdiction to try offenses of murder and manslaughter. Rev. Stats. U. S. Sec. 5339.

This territory has so much of sovereignty that no place can be said to be within the exclusive jurisdiction of the United States un-

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less some special act of Congress has made it so. Murder committed in one of the organized counties is an offense against the territory, and not against the United States. *Franklin v. United States*, 1 Col., 35; *United States v. Reynolds*; *Clinton v. Englebrecht*.

There is no special law that gave the United States exclusive jurisdiction over the *locus in quo*, at the date of the commission of the alleged offense or at any time since.

Sec. 3145 Rev. Stats. U. S., is relied upon as conferring jurisdiction. Under this section the question is, was the place where the offense is alleged to have been committed "Indian country?" 4 U. S. Stats., 729, Sec. 1.

The test is, has the Indian title been extinguished? If it has not it is Indian country; if it has, it is not Indian country. *Clark et al. v. Bates et. al.*, 1 Dak., 42; Same case, 95 U. S., 204.

Proclamation of President Grant of Jan. 11th, 1875, could not restore the Indian title which had been extinguished by treaty.

The effect of the reservation by such proclamation, is to withdraw the lands from sale and settlement; an act clearly executive and sanctioned by usage and Congress itself. *Grisar v. McDonald*, 6 Wall., 380.

Territorial courts exercise jurisdiction over military reservations not in the Indian country. Attorney General Cushing, 6 Opinions, 574-5, and again same vol. p. 363-4; *Reynolds v. People*, 1 Col., 179; *Clay v. State*, 4 Kan., 49; *People v. Godfrey*, 17 Johns., 225; *Com. v. Clay*, 8 Mass., 75; *United States v. Bevan*, 3 Wheaton, 388.

Every reservation of the government has the same effect. *Leavenworth, &c., R. R. Co. v. U. S.*, 92 U. S., 747; *United States v. Varela*, 94 U. S., 614; *United States v. Tom*, 1 Oregon, 29; *United States v. Seveloff*, 2 Saw., 311.

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It seems to us entirely clear, that since the treaty of 1868, the place of the homicide has never been Indian country.

But conceding that the proclamation of 1875 had the effect contended for by the U. S. Attorney, the proclamation of 1879, it must be conceded, had equal effect. If the first proclamation had the force and effect of a statute in extending the act of 1834, with all its provisions for the punishment of crime, including murder, the last proclamation repealed it, and with the repeal dropped every prosecution pending, in whatsoever stage the same might be.

This position at common law may be considered settled. *Hartung v. People*, 22 N. Y., 95; 1 Pleas of Crown, 291; *Miller's Case*, 1 Wm. Bl., 451; *Rex v. McKeozia*, Russ. & Ry., 429; *U. S. v. Passamore*, 4 Dall., 372; *Com. v. Duane*, 1 Binn., 601; *Yeaton v. U. S.*, 5 Cranch, 281; *Com. v. Kimball*, 21 Pick., 373; *Com. v. Marshall*, 11 Pick., 350; *Howard v. State*, 5 Ired., 183; *Cook v. Board of Police*, 16 Abb. Pr., 478; *State v. McDonald*, 20 Minn., 136.

It cannot be contended that any statutes of the United States, providing saving clauses in cases of repeal, apply to this case; for if any such statutes can be construed to apply to criminal cases at all, there is no such license permitted the courts as to class *proclamations* of the President as *statutes*, whatever legislative effect they may otherwise give them.

As to the extent of the right of cross examination, cited: *Com. v. Goddard*, 14 Gray, 402; *Metzer v. State*, 39 Ind., 596; *Burghart v. Brown*, 51 Mo., 600; *Jackson v. Feather River W. Co.*, 14 Cal., 18; *People v. Murphy*, 39 Cal., 52; *People v. Strong*, 30 Cal., 151; *Searles v. Thompson Bros.*, 18 Minn., 322; *Wilhelm v. Leonard*, 13 Iowa, 335; *Kelsoe v. State*, 47 Ala., 573; *Lightfoot v. State*, 16 Mich., 507; *Phares v. Barber*, 61 Ill., 271; 17 Pick., 490; 2 Gray, 262; 126 Mass., 23.

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The witness having been attacked by an attempt to show contradictory and inconsistent statements, defendant had the right, either by cross examination or fresh witnesses, to support him by showing that, at a period so remote that he would not be presumed to have them manufactured a story, he had related the occurrence the same as he tells it in court. *State v. Dennis*, 32 Vt., 158; *Robb v. Hackey*, 23 Wend., 50; *State v. Laxton*, 78 N. C., 664; 1 Gray, 83 and 340; *State v. Petty*, 21 Kan., 54; *Brookbank v. State*, 55 Ind., 169; *Green v. Cochran*, 43 Iowa, 544; *Wade v. Thayer*, 40 Cal., 578; *Daily v. State*, 28 Ind., 285; *Coffin v. Anderson*, 4 Blackf., 398; *Beauchamp v. State*, 6 Id., 299; *Stewart v. People*, 23 Mich., 63; 2 Phil., on Ev., 4th Ed., 600, n; Wharton Cr., Ev. Sec., 492; Roscoe Cr. Ev., 102-103, and notes.

Upon the law of self-defense, cited: *Tweedy v. State*, 5 Iowa, 498; *Erwin v. State*, 29 Ohio St., 186; *People v. Lilly*, 38 Mich., 270; *Runyan v. State*, 57 Ind., 80; *Long v. State*, 52 Miss., 23; *Fortenberry v. State*, 55 Miss., 409-10; *Bohannon v. People*, 8 Bush., 481, reported 8 Am. Rep., 474; *People v. Batchelder*, 27 Cal., 70; *Pond v. People*, 8 Mich., 174; *Patton v. People*, 18 Mich., 834.

Hugh J. Campbell, U. S. Attorney, for defendant in error.

This was Indian country at the time of the homicide, under the decisions of the following authorities: *Bates v. Clark*, 95 U. S., 204; 15 Stats. at Large, 635; *Harkson v. Hyde*, 8 Otto, 476; 13 Peters, 509; 6 Wallace, 380; *U. S. v. Cisna*, 1 McLean, 254; *Worcester v. Ga.*, 6 Peters, 515; *U. S. v. Stahl*, 1 Woolworth, 20; *U. S. v. Sa-luc-da-cot*, 1 Abbott, U. S. R., 377.

As to the power of the President by proclamation to make reservation of the public lands for any purpose, and the statutes of Congress upon which that power is founded, see *Wilcox v. Jackson*, 13 Peters, 509; *Grisar v. McDonald*, 6 Wallace, 380.

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The territory covered by President Grant's proclamation of Jan. 11th, 1875, is a treaty reservation. See Johnson's Treaty; 15 Statutes at Large, Sec. 505.

The United States had exclusive jurisdiction over the *locus in quo* at the time of the homicide and of the indictment. *Harkness v. Hyde*, 8 Otto, 476; *Langford v. Meredith*, 11 Otto, 145.

This Court acquired jurisdiction of the offense by the indictment. This jurisdiction is still in the Court.

1st. Because it has still complete jurisdiction of the *locus in quo*, it being now a part of the Second Judicial District; and

2nd. The law creating the offense is unrepealed.

The crime of murder in the Indian country is still a crime by law, unrepealed. The place of the offense is still in the Second Judicial District. So that all the authorities cited by appellant as to the ousting of jurisdiction, either by a repeal of the law or by a change in the territory of the District, are inapplicable.

This is not one of those cases. This is a case simply where a particular place at which a certain crime, when committed, was by law cognizable in the United States courts, was not, at the time of the trial, a place where the same kind of a crime, if now committed, is cognizable by these courts.

Ergo, says appellant, that which was cognizable when committed, is no longer cognizable, because a *similar crime now committed* would not be cognizable.

The statement of the proposition refutes it. There is no such doctrine in the authorities. If there were still any doubt, Sec. 13 U. S. R. S. expressly saves the jurisdiction in the case. Treaties have the force and effect of statutes, and are included under the provisions of Sec. 13. *Martin v. Wheaton*, 1 Wheaton, 304; *Foster v. Neilson*, 2 Peters, 253.

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Another principle that is applicable to the point in issue is this:

When there is no express repeal of any part of the treaty, treaty and statute should be so construed *together*, and as far as possible the provisions of each should be allowed to stand. *U. S. v. Berry*, 4th Fed. Rep., 745.

The provisions of the law governing crimes and offenses in Indian country, in force at the time of the treaty, became part of the treaty by operation of law, and the United States is bound by these treaty obligations to punish all offenses covered by section 2145 R. S., which should occur at any time in any part of the territory which then or thereafter should become Indian country.

As to the impeaching testimony, the abstract of appellant does not give the whole of the rulings, and offers and testimony bearing on the point in question.

When Budd had testified that he was present at the killing, Mr. Maxon was introduced for the purpose of showing contradictory statements made by Budd to Maxon, as to the time of his presence at the place where the murder was committed.

Counsel for defendant treated this as an impeaching question, and objected to it on the ground that no proper foundation had been laid for such a question, and so the court treated the question, and Maxon was then dismissed from the witness stand and Budd recalled for the purpose of laying the foundation by further cross-examination.

Budd, on the further re-cross-examination, was propounded a formal impeaching question as follows:

Mr. Budd, did you not on the 16th or 17th day of April, 1877, at Pierre, in this territory and district, say to Charles Maxon, this man, that you had got into Pierre two days before the 16th or 17th?

Ans.—No, Sir, I did not.

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Q.—You did not?

Ans.—I did not.

Further on, on re-direct examination Budd testifies:

“I had a talk with Maxon, *a day or two after the shooting, but not about the shooting.*”

“I don’t recollect of saying anything about the time when I arrived in camp.”

Then Maxon was recalled, and the identical question which had been propounded to Budd was propounded to Maxon.

To that question he answered—Yes, sir.

This was in accordance with the practice and rulings of the court as to the manner of putting impeaching questions, and is sustained by the authorities. 1 Wharton Ev., 552, 555; *Conrad v. Guffey*, 16 How., 35; *McKinney v. Neil*, 1 McLean, 540; *Everson v. Carpenter*, 17 Wendel, 419; *State v. Hoyt*, 13 Minn., 132; *People v. Devine*, 44 Cal., 452; *Gaffney v. People*, 50 N. Y., 423; *Kelchingman v. State*, 6 Wis., 426.

On re-examination the witness impeached may be asked as to the details of the contradiction. Wharton Cr. Ev., 485, 482. Appellant did not offer to re-examine the impeached witness. He was permitted to cross-examine the impeaching witness, Maxon, at length.

After a particular cross-examination in which the witness, Maxon, gave all the conversation in question, in full, he was asked:

Q.—That’s all you remember of the conversation?

Ans.—That’s all I recollect.

Maxon was dismissed.

Afterwards, the next day we think, he was recalled by defendant for further cross-examination, and then was asked the question objected to. In this question he was asked to state, not anything as

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to the former subject upon which both he and Budd had been examined, and Maxon cross-examined. Nothing of the kind. But he was asked what Budd told him as to an entirely different matter, the circumstances of the homicide.

This was not competent evidence nor cross-examination. It was clearly hearsay. It was in every way incompetent as testimony, and irrelevant to any issue. Its object could only have been to raise an inference in the minds of the jury that he had been present at the homicide, *because he had told some one that he had been*. Could anything be balder hearsay? The case in 14 Gray, cited, is not in point. That inquiry on cross-examination was as to witness' own ground for making a particular statement to which he had testified. This is not that case. That was competent testimony. This is incompetent. A difference about as broad as can exist usually between any two things. The very question refused by the court in 14 Gray, was allowed in this case.

And witness, in answer to it, had said that he had told all the conversation which he remembered.

The case in 39 Ind., 597, relates to the doctrine of confessions and admissions, and is the well settled law from time immemorial. But it is not in point here.

The case in 51 Mo., is still further from the point. The issue there was the signing of a note. The conversation in evidence was part of the conversation as to whether defendant did sign the note. Part of defendant's statements on *this point* were admitted, and part rejected. As the court say it was *about the very matter in controversy*. That is not this case. It is the old, old case—where a part of the conversation on a specified subject is given, all must be given.

14 California decides simply that cross-examination ought to be allowed a free range within the subject matter of the examination in chief. It also says that *undoubtedly it cannot go beyond that*

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matter. There the subject matter was the water that the witness says was running over the flume.

Here the subject matter is—Did Budd say to Maxon that he came to him a day or two before the 16th or 17th of April? The court in 39 Cal., limit the cross-examination to the *same subject matter*. It was an extreme case of a violation of the rule of law. It is not this case.

The argument of counsel on the Maxon testimony has two propositions:

1st. That the question propounded was proper cross-examination.

On this point his authorities do not bear him out, are not in point, and so far as the principles they lay down do apply to this case, are against him.

2d. But the gist of his position—the real proposition that he desires to persuade this court to announce as a part of the law of evidence, when stripped of its garments of rhetoric, and standing out as a bald, naked proposition of law, is this: To prove that Budd was present at the place he said he was by giving in evidence his hearsay statement, unsworn to, to Maxon, that he was present. No single authority cited by appellant, nor that was ever cited, nor that ever will be cited, sustains this bold and original proposition.

Last and most decisive, the question was not competent because it sought to contradict his own witness Budd.

Budd had testified:

Q. "You did have some talk with him?" (Maxon.)

Ans.—"Yes, but not about the shooting."

Now after this testimony of their own witness, counsel seek to prove by Maxon that Budd did have a *long, detailed* conversation with Maxon about the shooting.

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To recapitulate:

There was no error in the ruling of the court, in not allowing the question to Maxon.

1st. Because it was not cross-examination.

2d. Because the original question to Budd and to Maxon which was the subject matter of the cross-examination was a strictly impeaching question, limited to a single point, at a certain place and time, and was so treated on defendant's own motion, and on his motion the court so treated it, and was accordingly governed in its rulings.

At defendant's own instance the court thus limited the question. He cannot now be heard to question a ruling brought on by his own motion and to treat the evidence by a different rule than he himself invoked below.

3d. Because the evidence sought for was hearsay and therefore incompetent.

4th. Because by the question and offer, the counsel sought plainly to contradict his own witness and it was therefore incompetent.

Self defense is no new question. It is one of the oldest, and our own district and Supreme Courts have repeatedly settled the law as to this territory. *U. S. v. Gay*, 2 Dakota, 125; *U. S. v. Leighton*, 3 Dakota; *U. S. v. Gallinaux*, 3 Dakota; Code of Dakota; *U. S. v. Vigol*, 2 Dallas, 347; *U. S. v. Haskell*, 4 Washington C. C., 402; *Patterson v. People*, 46 Barlow, 69; *People v. Schryver*, 42 N. Y., 1; *State v. Martin*, 30 Miss.; *Com. v. York*, 9 Metcalf, 115; *People v. McLeod*, 1 Hill, 436; *Commonwealth v. Selfridge*.

The jury are the judges of the reasonableness of the apprehension. Selfridge Case.

Retreat:

The law of retreat as laid down by the authorities supports the

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charge. Selfridge Case; *Commonwealth v. Drum*, 58 Penn., St.; *People v. John Doe*, 1 Mich., 451; *People v. Sullivan*, 3 Selden, 396; *State v. Benham*, 23 Iowa, 154; *State v. Shippey*, 10 Minnesota, 133; *Isaacs v. State*, 25 Texas, 174.

Nor is there anything in even the most extreme cases of Kentucky and Texas, *when the facts on which* the instructions were delivered, are considered, which contradicts the law laid down in the charge of the court below. *Bohannon v. Commonwealth*, 8 Bush, 481.

The true line of distinction between the law of retreat as applicable to cases of self defense culpable, and self defense justifiable, is well distinguished in a note to Selfridge's case. Horrigan's Cases, p. 32; Dakota Code, p. 766, p. 890.

Assault brought on by slayer as modifying doctrine of self defense:

On this point we ask attention to the following authorities: Selfridge Case, Horrigan's Cases, p. 24; *State v. Shipley*, 10 Minnesota, 223; *Regina v. Smith*; Horrigan's Cases, p. 130; 1st Bish. Crim. Procedure, p. 1279; *White v. State*, 17 Ark., 404; *People v. Mark*, 2 Parker Cr., 673; *Yancy v. State*, 20 Texas, 656.

MOONY, J. At the April term, 1877, of the district court for the Second district, the plaintiff in error was indicted for the murder of one David Rauck, and having thereafter been arrested he was, at the November, 1881, term of said court, tried and convicted of manslaughter.

The offense is alleged to have been committed April 10th, 1877, at what is now known as Pierre, in the county of Hughes, but then Indian country.

The contention for the plaintiff in error is, that the offense of

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murder committed at the place thus alleged, was not an offense against the United States because it was not committed at a place within the sole and exclusive jurisdiction of the United States, nor in the Indian country within the meaning of the acts of Congress extending the Crimes Act to the Indian country; and therefore the jurisdiction of the offense was not in the court while sitting as and exercising the jurisdiction which pertains to district and circuit courts of the United States, but that the crime was one committed against the laws of the territory, and cognizable, if at all, only in the court sitting for the counties and sub-divisions, and to be prosecuted in the name of the territory.

To define what is Indian country, within the meaning of the act of congress punishing crimes therein committed, is not entirely free from difficulty. The definition given in the act of congress, if not absolutely repealed, has become obsolete and without meaning, as applied to the present condition of the country west of the Mississippi river.

Without entering into a more elaborate definition, it is sufficient for the purposes of this case, to say that the term Indian country includes such portions of the public domain as are expressly reserved for the use and occupation of the several bands and tribes of Indians, and which are not included within the jurisdiction of any state or territorial government.

By the treaty with the Sioux Indians proclaimed February 24th, 1869, 15 U. S. Statutes at Large, page 635, it is among other things, provided that a certain district of country in this territory therein described, together with all existing reservations on the east bank of the Missouri river, shall be set apart for the use and occupation of the Indians therein named; and in article 2nd. of said treaty, it is further provided that they shall have the exclusive use of such district of country and "of all such territory as may be added to this reservation for the use of said Indians."

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On the eleventh day of January, 1875, the then President of the United States, U. S. Grant made and proclaimed the following executive order:

EXECUTIVE MANSION, Jan. 11th, 1875.

"It is hereby ordered that the tract of country in the territory of Dakota lying within the following described boundaries, viz.: "Commencing on the east bank of the Missouri river where the "46th parallel of north latitude crosses the same; thence east with "said parallel of latitude to the 99th degree of west longitude, "thence south with such degree of longitude to the east bank of "the Missouri river, thence up and with the east bank of said river "to the place of beginning, be, and the same hereby is, withdrawn "from sale, and set apart for the use of the several tribes of Sioux "Indians, as an addition to their present reservation in said territory."

This tract includes the *locus* of the crime charged against the plaintiff in error.

The authority of the President to make such an order and thereby to reserve the district of country therein described, for such uses, cannot reasonably be questioned, and has been affirmed by several decisions of the Supreme Court of the United States.

Such district of country was, by the treaty, and the action of the President, taken out of the operation of the criminal laws of the territory. The trade and intercourse laws of the United States were extended thereover, as well as the laws for the punishment of crimes, and it was constituted Indian country within the meaning of the acts of congress extending the Crimes Act to the Indian country. It follows that the offenses of murder and manslaughter therein committed, were offenses against the United States, punishable under its laws, and that the District Court sitting for the whole district and exercising the jurisdiction which pertains to the District and Circuit Courts of the United States,

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had jurisdiction of this offense at the time of the finding of the indictment, and continued to have such jurisdiction, unless ousted thereof by the effect of the subsequent executive acts to which I shall refer.

By an order of the President, dated August 9th, 1879, all that portion of the Sioux reservation, in Dakota territory, created by executive order of January 11th, 1875, (including the place of this crime), was restored to the public domain.

The further contention is that this subsequent executive order operated to repeal the acts of congress punishing crimes committed in that portion of the Indian country, and with such repeal this prosecution must fall.

Without considering the question of power involved, in view of the treaty stipulations, the effect is not as claimed by the learned counsel. The commission of murder in the Indian country is still a crime against the United States. The same court now has jurisdiction over that particular place to punish crimes there committed against the United States. The judicial district is the same; the jurors are drawn from the same district of country, and moreover, section 13, U. S., Rev. Stat., expressly preserves the jurisdiction of the court, notwithstanding the repeal of a criminal statute, over an offense committed before such repeal. Certainly no greater effect can reasonably be given to this subsequent executive order, than should be given to the express repeal of a statute punishing an act as criminal.

The District Court therefore properly exercised its jurisdiction in this case.

During the progress of the trial a witness, Budd, was called by the plaintiff in error, who testified that he was present at the time of the homicide, and gave evidence tending to prove the killing was in self defense. Upon his cross-examination, (being recalled for the purpose), in answer to a question propounded to him by

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the United States Attorney, he denied having said to Charles Maxon—a witness for the prosecution—that he had arrived at Pierre two days before the 16th or 17th of April, 1877. Charles Maxon was then called by the prosecution to prove that Budd had told him at Pierre, on the 16th or 17th of April, 1877, that he, Budd, had arrived at that place two days before, the object being to discredit Budd in his testimony as to what occurred at the scene of the homicide, such homicide having occurred, by the undisputed evidence, on the 10th of April, six or seven days before the alleged time of the conversation between the witnesses, Maxon and Budd. After he had so testified in chief, upon his cross-examination in relation to the declaration of Budd, the defendant's counsel asked Maxon the following question: "You spoke of a conversation you had with Mr. Budd sometime about the 16th or 17th of April, 1877; Did he tell you at that conversation anything with regard to this homicide?" This question being objected to by the U. S. Attorney, the objection sustained by the court, and the ruling duly excepted to, the defendant's attorney asked the witness, Maxon: "What, if anything further, was said in the conversation you have just testified to," and offered to prove by this witness that at the time and place of such conversation given in chief, and as a part of it, the said Budd told the witness, Maxon, that he, Budd, was present at the Rauck homicide, and detailed to him, Maxon, the facts of the killing as he saw them.

This question and the offer being objected to by the U. S. Attorney, the court sustained the objection and the evidence was excluded. To which ruling the defendant duly excepted.

In his examination in chief the witness Maxon had testified, as we have seen, that Budd told him on the 16th or 17th of April, that he had arrived at Pierre two days before, that is four or five days after the homicide. The sole pertinency of this testimony consisted in its tendency to contradict by such statements made out of court, what he, Budd, had testified to in court, to wit: That

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he was present at the homicide. In other words it was an attempt to impeach Budd by showing that he had made statements out of court contradictory to those made in court from the witness stand. Surely anything which transpired in that conversation which tended to explain such alleged contradictory statements, or which tended to show that his statements then made, were not in fact contradictory to what he had testified in court, was pertinent and was proper to be drawn out upon cross-examination of the witness who had testified to such contradictory statements.

No rule is plainer than that a party has the right upon cross-examination to have given all other parts of the same conversation, not given in the examination in chief, which will serve to explain or to modify the tendency of that part testified to in chief.

It will be borne in mind that Maxon did not testify to the fact of Budd's arriving in Pierre two days before the 16th or 17th of April, but only that Budd told him he had then arrived there. If he had been permitted to testify that, in the same conversation, Budd had told him he was present at the homicide, and had detailed to him the facts that then occurred, it would have tended to explain the other statement and to remove the impression it was calculated to make upon the minds of the jury, and to show that either Maxon was mistaken in his statement as to the time when Budd said he had arrived, or that Budd had carelessly given an erroneous date of his arrival, a fact wholly unimportant except so far as it had connection with his presence at the scene of this homicide. The testimony of Maxon in chief, was important and material in throwing discredit upon Budd's testimony, and the defendant, as well as Budd, had the right to have all the conversation which would tend in any degree to shed light upon the fact as to when he did arrive at Pierre; and a statement then made that he was present at the homicide, and saw what occurred, would have tended strongly to prove that his two statements were perfectly consistent with each other. Budd had testified to facts which, if

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true, were very important to the defendant in his defense. If the jury believed that Budd was not present because he had only arrived at Pierre on the 14th or 15th of April, four or five days after the homicide, then all his testimony relating to facts transpiring at that time, they would have disregarded; whereas, if Maxon had testified as defendant's counsel offered to prove by him that so shortly after the occurrence, Budd had told him that he was present, and gave him a detailed statement of what there occurred, the effect of Maxon's testimony would have likely been in defendant's favor, rather than against him.

The exclusion of this testimony which was proper to be adduced upon cross-examination, it being a part of the same conversation called out by the examination in chief, was manifest error which must have prejudiced the defendant, and for this error thus manifestly prejudicial to the defendant, the judgment must be reversed and a new trial awarded.

The other points made by counsel are not important now to be considered except we may remark that the exceptions urged to the instructions of the learned Chief Justice who presided at the trial, are not well taken. His charge upon the law of self defense objected to was as favorable to the defendant as the facts in the case would warrant.

The judgment is reversed, a new trial ordered, and the cause remanded for further proceedings according to law.

All of the Justices concurring.

 Smith v. St. Paul Fire & Marine Insurance Co.

SMITH V. ST. PAUL FIRE & MARINE INS. CO.

1. **INSURANCE POLICY: WAIVER OF CONDITION IS:** Upon a policy of insurance in which one of the conditions was that in case of default of payment of any note given for premium, the company should not be liable for any loss happening during the continuance of such default, held; there being a breach of such condition the company may waive the forfeiture either by express language or by acts from which an intention to waive may be inferred.
2. **WAIVER: WHAT AMOUNTS TO:** If in any negotiations or transactions based upon the policy and relating thereto after forfeiture, under circumstances indicating to the company or its authorized agent, that the insured makes a claim under the policy, notwithstanding such default, and no reply is made to such claim indicating the intention of the company to take advantage of the forfeiture, and the insured afterwards incurs the trouble and expense of making proofs of loss, held; the forfeiture is thereby waived.
3. **SAME: ACCEPTANCE OF PREMIUM:** Held further, that the acceptance of the cash premium by the general agent of an insurance company after default and notice of the loss, operates as a waiver of the forfeiture, and renders the company continuously liable on the policy as though the note given for cash premiums had been paid at maturity.

Appeal from the District Court of Cass County.

Wilson & Bull, for appellant, cited:

Civil Code, Sec. 934. *Williams v. Albany Ins. Co.*, 19 Mich., 451, 2 Am. Rep., 98; Civil Code, Secs. 1937, 941, 942, 943, 944; May on Insurance, Sec. 342; Civil Code, Sec's. 955, 956, 1544; *Dunforth v. Charles et al.*, 1 Dak., 285.

H. F. Miller, for respondent, cited:

Jolliffe v. The Madison Mutual Ins. Co., 39 Wis., 117; *Tyrie v. Fletcher*, Cowp., 668; May on Insurance, Sec. 4; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Appleton Ins. Co. v. British A. Ass., Co.*, 46 Wis., 33. Civil Code, Sec's. 955, 956, 957;

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Wing v. Howry, 27 Eng. L. and Eq., 140; *N. Berwick & Co. v. Ins. Co.*, 52 Me., 336; *Miner v. Phoenix Ins. Co.*, 27 Wis., 693; *May on Insurance*, Sec's. 361-3; *Parsons on Contracts*, Vol. 3, p. 155, and 159, note 9; *Williams v. Daken*, 22 Wend., 211.

HUDSON, J. On the 9th day of September, 1880, the defendant issued to said plaintiff its policy of insurance, covering among other things two horses.

Said policy was issued in consideration of the payment, at maturity, of a certain promissory note of \$10.66-100, due Nov. 1st, 1880, and certain other installment notes to become due at future periods, all executed at the same time of the policy, and was the only consideration therefor.

One of the conditions of insurance contained in the policy was, that said company should not be liable, under the policy, for any loss or damage if any default should be made in the payment of any note or installment of any note in full, given in payment or part payment of premium, under said policy; and that the company in no event should be liable for any loss or damage happening during the continuance of such default.

The note first above referred to, contained the following provision: "This note being given as consideration for insurance, "under the above named policy, I consent that in case of default "in the payment of the same in full, when due, the policy shall be "null and void, and so remain until the note is paid; and if said "policy becomes void by reason of non-payment of this note, it shall "in no way affect the collection of this note in full.

The policy of insurance contained the further provisions, viz: "And it is further provided that on the payment by the assured, "or his assigns, of all such notes or installments of any such "notes, in full, the liability of the company, under the policy, "shall again attach, and the policy thereafter be in force."

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The said first note was duly presented for payment, but was not paid at maturity. On the 8th day of November, 1880, a fire occurred and the said horses were destroyed. On the 12th day of November, 1880, the plaintiff forwarded by letter to the general agent at Fargo, D. T., the amount due on said note, and in the same letter stated to the agent that his stable and the two horses were burned on the 8th instant, and requested him to come and see to it at once, adding that if they could make a settlement he would like to insure more. The agent retained the money and endorsed upon the note "Paid in full, Nov. 12, 1880," and returned the note so endorsed to the plaintiff, and so far as appears, made no other reply to the letter.

Subsequently the plaintiff forwarded proofs of loss to the defendant as required by the terms of the policy; but it does not appear that any response was made by the defendant, until this action was brought, either to the notice of loss, or the proofs forwarded; when in its answer to the complaint it denied its liability under the policy, and alleged as a defense, the default of the plaintiff in the payment of his said first note at maturity.

The main question presented in this record, is whether the defendant was in a position to maintain such defense to this action.

It has been well settled by the adjudged cases that where there has been a breach of the conditions contained in an insurance policy, the insurance company may, or may not, take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result.

It is quite true that it is not obliged to do or say anything to make the forfeiture effectual, until a claim is made under the policy; but if in any negotiations or transactions with the assured,

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after knowledge of the forfeiture, it does acts based upon the policy, and the assured by virtue thereof, does some act or incurs some trouble or expense, the forfeiture as a matter of law is waived. *Titus v. Glens Falls, Ins. Co.*, 81 N. Y., 410-419; *Penn. Ins. Co. v. Vittle*, 39 Mich., 51.

This letter of the plaintiff made it obligatory upon the agent to make some reply—this was the time for him to speak—the letter required it. But he took the money in full for the note, making no response, and the plaintiff as it may be presumed, acting upon his own construction of what had been done, made and forwarded his proofs to the company.

It seems to us that the company, if it intended to take advantage of the forfeiture, should have said so in so many words. An insurance company cannot sleep upon its intention to avoid the policy, to the prejudice of the insured. The forfeiture may be waived by the laches of the insurance company, misleading persons interested in the policy to their prejudice. RYAN, Justice; In *Appleton Ins. Co. v. British A. Assu. Co.*, 46 Wis., 33.

In the case of *Joliff v. The Madison Ins. Co.*, 39 Wis., 111, it is held that the acceptance of the cash premium by the defendant in that case, after default and notice of the loss, operated as a waiver of the suspension clause, and rendered the defendant continuously liable on the policy the same as though the note for cash premium had been paid when due.

That this would be the legal effect unless by the agreement, in case of default, the whole cash premium should be considered earned; in that case the insured having earned the premium, would be entitled to receive it in any event.

The counsel for the appellant in this case insists that the recital in the note, "if said policy becomes null and void (suspended) by reason of non-payment of this note it shall in no way affect the collection of the note in full," is equivalent to saying that the

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premium shall be considered earned. This construction might be given to it but for the further provision in the policy, that on the payment of the note in full the liability of the company under the policy shall again attach. If the premium has been earned on the default there would be nothing left to pay the premium after the liability again attached. Such cannot be the legal effect of the clause cited.

The whole cash premium had not been earned when the defendant's liability in the policy was suspended, but only a *pro-rata* portion of it; Neither did the premium run during the suspension.

On the failure of the plaintiff to pay the note when due the liability of defendant on the policy ceased, and without restoring such liability it was entitled to receive on such note what the policy had earned while in force, and it could have refused to receive any sum in excess of what the policy had so earned; but the defendant by its agent received the whole cash premium for which the note was given. By so doing it received compensation for the risk covering the time when the loss occurred, and it can not now be heard to allege that at the time of the loss it had no risk on the property insured. The acceptance of the full premium after notice of loss is entirely inconsistent with the claim that the risk was suspended when the loss occurred.

This disposes of the case and renders it unnecessary to consider any other questions raised in the argument of counsel.

The judgment of the District Court is

AFFIRMED.

All the Judges concurring.

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UNITED STATES v. SPAULDING.

UNITED STATES v. CAMERON.

UNITED STATES v. PARSONS.

1. **INDICTMENT: CAPTION: JURISDICTION:** HELD, that the caption of the indictment in this case, properly defines the jurisdiction in U. S. causes, conferred by the acts of Congress creating the District Courts of the territory; affirming "U. S. v. Beebe," 2 Dak., 292.
2. **CONSTRUCTION: SEC. 5421, U. S. REV. STATS.: FALSE PRE-EMPTION PROOF:** The false writing specified in the third clause of Sec. 5421, U. S. Rev. Stats., includes one false in respect to the facts embodied therein, as well as one falsely made and forged.
3. **SAME: "CLAIM" DEFINED:** The word "claim" therein used includes the claim to exercise the right of pre-emption, and the claim to thereby acquire from the United States government title to the public lands.

Error to the Second Judicial District Court.

Hugh J. Campbell, U. S. Attorney for plaintiff in error, cited:

United States v. Beebe, 2 Dak. Rep., 292; *United States v. Adams*, id., 305; Rev. Stats., U. S., Sec. 1910; *United States v. Staats*, 8 How., 41; *United States v. Wilcox*, 4 Blatchford, 389; *United States v. Bickford*, 4 Blatchford, 341; Rev. Stats., U. S., Sec's. 2259, 2261, 2264, 2265, 2266, 226, 2269, 2270, 2272, 2275, 2283, 2284, 2244, 2255, 2442; *Prigg v. Com.*, Pa., 16 Peters, 424; Brightly Fed. Digest, Vol. 1, page 194; *Devereaux'* Court of Claims, Repts., p. 41; *United States v. Reese*, 4 Sawyer, 622, *cited*, and distinguished; same case reported, 9 Wallace, 13

Bartlett Tripp, *J. W. Losey*, and *J. R. Gamble*, for defendant in error and other persons indicted for similar offenses, cited:

Attorney General Cushing, 8 Opinions, 72, (1856); Attorney General Bates, 10 Opinions, 57; Attorney General Speed, 11

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Opinions, 462; Attorney General McVeagh, Copps Land Owner, Aug. 11, 1881; *Frisbie v. Whitney*, 9 Wallace, 187; Yosemite Valley Case, 15 Wallace, 77; *Bower v. Higbee*, 9 Mo., 26; *Phelps v. Kellogg*, 15 Ill., 135; *Grand Gulf v. Bryan*, 8 S. & M., 268; *People v. Shearer*, 30 Cal., 650; Dwarris on Statutes, 245; Rev. Stats., U. S., Sec's. 236, 1059; *Bonner v. United States*, 9 Wall., 156; *Langford v. United States*, 11 Otto, 345; Rev. Stats. U. S., Sec's. 2477, 2263, 3477; *United States v. Gillis*, 95 U. S., 412; *Dowell v. Cardwell*, 4 Saw., 228; Act of May 18, 1858, 11 Stats. at Large, 290; Act of Sept. 4, 1874, Sec. 13; *Smith v. Lockwood*, 13 Barb., 209; *Thurston v. Prentice*, 1 Man., (Mich.) 193; *Bassett v. Carlton*, 32 Me., 553; *Renwick v. Morris*, 7 Hill, 575; Dwarris' Statutes, page 275, and authorities cited.

MOODY, J. The defendant was indicted in the second district for transmitting and presenting to, and causing to be transmitted and presented to the United States land officers at Sioux Falls, Dakota, a false affidavit, in support of, and for the purpose of procuring, a fraudulent pre-emption entry of public lands, in the name of Melvin Waters, who claimed to exercise the right of pre-emption, and with intent to defraud the United States, knowing it to be false.

The indictment is brought under the last or third clause of section 5421 U. S. Revised Statutes, which reads as follows:

"Every person who transmits to or causes or procures to be transmitted to or presented at, or presents at any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing in support of or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited, shall be imprisoned at hard labor, for a period of not less than one year nor more than ten years; or shall be imprisoned not more than five years, and fined not more than one

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thousand dollars.”

The indictment is as follows:

UNITED STATES OF AMERICA, TERRITORY OF DAKOTA, Second Judicial District.	}	<i>Second District Court, November Term, 1881.</i>
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In the District Court in and for the Second Judicial District and territory of Dakota, sitting for the trial of all causes arising under the constitution and the laws of the United States, and having and exercising the same jurisdiction in all such cases as is vested in the circuit and district courts of the United States. At a term thereof, begun and held at the city of Yankton in the county of Yankton, in said district and territory, on the eighth day of November, A. D. 1881.

THE UNITED STATES OF AMERICA v. DUDLEY J. SPAULDING.	}
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The grand jurors of the United States in and for the said Second Judicial District and territory of Dakota, inquiring in and for the body of the said district, of all crimes and public offenses against the laws of the United States, committed and triable in said district; having been first duly and legally impanelled, charged and sworn according to law, upon their oath present; That on the first day of September in the year of our Lord, one thousand, eight hundred and seventy-nine, at a place in said district and territory, and within the jurisdiction of this court, one Dudley J. Spaulding, late of said district and territory, in support of and relation to a certain claim, commonly known and designated as a pre-emption claim of one Melvin Waters, then and there made in the name of the said Melvin Waters, as a pre-emption claimant before one John M. Washburn then and there being the receiver of the United States land office, and before Benjamin F. Campbell then and there being the register of the United States land office at the town of Sioux Falls, in said district and territory, in which said

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claim the said Melvin Waters, then and there claimed the right of pre-emption, and the benefits of the pre-emption laws of the United States, to the following public lands of the United States (here follows description) containing one hundred, fifty-eight and 61-100 acres, and by which said claim the said Melvin Waters then and there claimed said tract of land by pre-emption; unlawfully, and with intent to defraud the United States, did transmit to and present at, and then and there unlawfully, and with intent to defraud the United States, did cause and procure, to be transmitted to and presented at a certain office of the government of the United States, to wit: At the United States land office, at the town of Sioux Falls, in said district and territory, and to certain officers of the government of the United States, to wit: To Benjamin F. Campbell then and there being the register of said United States land office, and to John M. Washburn, then and there being the receiver of the said United States land office at said town of Sioux Falls in said district and territory, a certain false certificate and writing, he, the said Dudley J. Spaulding, there and then well knowing the said false certificate and writing to be false, which said false certificate and writing was then and there in the printed and written words and figures following, to wit:

(Then follows what is called "pre-emption proof" and "testimony of witness," and recital of their effect, together with the proper allegations of their falsity, and the indictment proceeds:

"He the said Dudley J. Spaulding, then and there well knowing the said certificate and writing to be false as aforesaid, and he, the said Dudley J. Spaulding, then and there well knowing the false statements aforesaid in said certificate and writing so stated as aforesaid to be false and fraudulent as aforesaid, and he the said Dudley J. Spaulding then and there well knowing said false certificate and writing then and there to contain said false and fraudulent statements aforesaid," (with the usual conclusion.

To the indictment the defendant demurred alleging two grounds.

First. That it appears by inspection thereof, that the court in which said indictment was found and is now pending, had and ex-

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exercised two separate jurisdictions of a circuit and district court of the United States, without specifying under which jurisdiction the court was acting at the time of finding said indictment.

Second. That said indictment does not state facts sufficient to constitute a crime or offense against the laws of the United States."

The demurrer was sustained, and the United States attorney brings the case here.

The order sustaining the demurrer is general, and includes in its terms both grounds alleged by the defendant, but we are assured the decision below was upon the second ground, and the first is not insisted upon here.

In any event, this court in *United States v. Beebe*, expressly decided this point, and held such a recital in the caption to be proper, and the jurisdiction thereby defined to be the precise jurisdiction conferred by the act of Congress creating the district courts. To that decision we adhere.

The demurrer for insufficiency presents two questions.

One. Whether the false writing spoken of in the third clause of Sec. 5421, includes one false in respect to the facts embodied therein, as well as one falsely made or forged.

Two. Whether the word "claim" therein used, includes the claim to exercise the right of pre-emption, and the claim to thereby acquire from the United States government title to the public lands.

No difficulty is encountered in determining the first point. This identical question, under the same statute, has been definitely decided by the Supreme Court of the United States, whose decisions are of course binding upon this court.

In *United States v. Staats*, 8 Howard, 41, the defendant was indicted for transmitting and presenting to the commissioner of

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pensions, in support of the application of one David Goodhard, for a pension, an affidavit, genuine as to the execution, but false as it respected the facts embodied in it.

In that case the court uses the following language:

"The court are of opinion that the offense charged in the indictment comes within the statute.

"The only doubt that can be raised is whether the writing transmitted or presented to the commissioner in support of the claim for a pension, should not within the meaning of the statute, be an instrument forged or counterfeited in the technical sense of the term; and not one genuine as to the execution, but false as it respects the facts embodied in it."

"The instruments referred to in the first part of the section, the false making or forging of which, with the intent stated, is made an offense, probably are forged instruments in a strict technical sense; and there is force therefore in the argument, that the subsequent clause, making the transmission or presentation of deeds or other writings to an officer of the government, a similar offense, had reference to the same description of instruments."

"But this is by no means a necessary conclusion upon the words of the statute. Indeed upon this construction it is not easy to see the materiality of the clause; because the uttering and publishing of the forged instruments mentioned in the first clause, as true, is made an offense, the same as the forging; and it is quite clear, that the acts provided against in the subsequent clause amount to an uttering and publishing. If restrained therefore to forged instruments the clause would seem to be unnecessary."

"The deeds and other writings mentioned are not connected with those in the preceding paragraph, as would have been natural and almost of course, if intended to describe similar instruments. The language is 'any deed, power of attorney' etc., not, the afore-said deed, which words must be in effect interpolated, upon the

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construction contended for."

"The clause therefore, may well be regarded as providing for a distinct and independent offense—one essential to the protection of the government against fraudulent claims; and which consists in the transmission or presentation of false or counterfeit papers to any officers of the government in support of an account or claim, with intent to defraud."

"The case is within the mischief intended to be guarded against, and also within the words * * * A genuine instrument containing a false statement of facts, used in support of a claim, the party knowing it to be false, and using it with the intent to defraud, presents a case not distinguishable in principle, or in turpitude or in its mischievous effects, from one in which every part of the instrument is fabricated; and when the one is as fully within the words of the statute as the other, we may well suppose that it was intended to embrace it."

We have quoted thus at length from the opinion of the court in that case, because the decision not only disposes of the first question mooted in this case, but several principles of construction are enunciated, which have an important bearing upon the further consideration of this issue.

Upon the proper construction to be given the term "claim," as used in the statute, more doubt exists.

In the case of the *United States v. Wilcox*, 4 Blatchford, 389, the defendant had been indicted under this same clause of section 5421, for transmitting to, and presenting at, the office of the commissioner of pensions a certain false, forged, and counterfeited writing, in support of, and in relation to, a claim which he was making before the commissioner, for "bounty land."

Upon a demurrer to the indictment, the point was squarely made, that the word "claim" in the statute, meant only a claim for money, and therefore, the claim in question being described

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as a claim for "bounty land," did not come within the meaning and intent of the law.

That court in deciding the question raised by the demurrer says:

"In respect to each" (of the papers described) "it was argued that the word 'claim' as used in the statute, can have reference only to a claim for money, and does not embrace a claim for bounty land." * *

"The careful addition after the word 'account,' of a term of a much broader significance, and the use of the very comprehensive language which immediately precedes these terms, satisfy me that it was the intention of Congress to embrace all claims, whether for land or money, and thus the construction insisted upon by the defendant cannot be maintained.

See also *United States v. Bickford*, 4 Blatchford, 341."

Under the pre-emption laws the words "claim" and "claimant," are frequently used in connection with the right to thus acquire title to the public lands.

By Section 2264 U. S. Rev. Stat., the settler is required to file a written statement "declaring his intention to *claim* the land under the pre-emption laws."

"Section 2265 provides that "every *claimant* under the pre-emption laws for land * * * is required to make known his *claim* in writing to the register * * * otherwise his *claim* shall be forfeited * * *"

Section 2266: "In regard to settlement * * * the pre-emption *claimant* shall be * * *"

Sec. 2267: "All *claimants* of pre-emption rights * * * shall make the proper proof and payment for the lands *claimed* * * *"

Sec. 2269. "When a party entitled to *claim* the benefits of the pre-emption laws dies before consummating his *claim* * * *"

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Sec. 2270. "Whenever the vacancy of the office, either of *
 * renders it impossible for the *claimant* to comply * *
 the party *claiming*" (shall not be prejudiced) "in respect to any
 matter essential to the establishment of his *claim* * *."

And so in numerous other sections, is the right of pre-emption entry spoken of as a *claim*. It is frequently spoken of also, as a *right*. It is by the law a right demandable, to be exercised under the provisions and conditions of the law. True, it is not a vested right as against the government, until due proof is made and the money paid to the proper officer, and is therefore liable to be defeated by a legal transfer of the land to another; by an authorized withdrawal of the lands from the operation of the act, or by a repeal of the law.

Neither is a claim for pension or bounty lands a vested right, and such claim may be defeated by a repeal of the law, or in other ways.

What is a claim? "It is, in a just, judicial sense, a demand of some matter as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty." *Prigg v. Commonwealth of Pennsylvania*, 16 Peters, 615.

Noah Webster defines "claim" as, "To call for; to ask or seek to obtain by virtue of authority, right, or supposed right; to challenge as a right; to demand as due;" "To be entitled to anything as a right; a demand of a right or supposed right; a right to claim or demand; a title to any debt, privilege, or other thing in possession of another; that to which any one has a right; as a *settler's* claim."

A claim to exercise the right of pre-emption is a claim made to a benefit arising under the wise and beneficent laws of Congress, by which the actual and *bona fide* settler can secure title to the government lands at a mere nominal price; and so long as the law exists, and the lands are subject to pre-emption entry, the settler

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can demand of the government officers as of right, to be permitted to thus obtain the title to the public lands, upon complying with the conditions upon which the right depends.

We think such a claim comes within the definition of the term "claim" as used in the clause of section 5421 under consideration.

Certainly it "is within the mischief to be guarded against, and also within the words of the statute."

No other statute seems to cover the case of a fraudulent procurement of title to the public lands under the pre-emption acts. It is not to be presumed that Congress has neglected the important duty of providing protection both to the government and the actual settler against the fraudulent and wicked acts and attempts of designing and unscrupulous persons, by means of false affidavits, and other false and forged writings, in procuring title, at a mere nominal price, of vast bodies of public lands, to the detriment of the public interests, by retarding the development of the country, and to the exclusion of the actual and *bona fide* settler, or to his oppression by compelling him to purchase of the speculator at a greatly enhanced price.

The supposed remedy afforded by a prosecution for perjury or subornation of perjury, a prosecution always doubtful and proverbially difficult to maintain, is in no sense an adequate remedy. It may, and no doubt does occur, that the proof rests wholly upon forged instruments. In such case, a prosecution for perjury would not lie; neither would one for forgery, if the term "claim," as used in the statute, does not include a pre-emption claim; as the use of forged and counterfeited writings is put upon the same footing with the use of writings false in the statement of facts.

While the area of public lands was great, and the policy of the government allowed of their disposal at public or private sale for cash, the right of pre-emption was perhaps not so valuable a right, and not likely to be so zealously guarded as now, when the public

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lands valuable for agriculture, are rapidly being exhausted, and the wise policy has been adopted of reserving them for the use of the actual settler, who will make thereon his home and a home for those dependent upon him.

A claim to exercise the right of pre-emption, or a homestead right, is too valuable, especially in this territory, where frequently now its perfection at once raises a man from poverty to comfort, and sometimes almost affluence, to permit the unmixed evil to ensue of throwing open wide the door for fraud, and putting these valuable lands at the mercy of the unscrupulous and rapacious speculator, if the law by any reasonable construction has interposed a barrier.

A presumption of innocence always rests upon the person charged with a public offense, and is only removed by proof of his guilt beyond a reasonable doubt; but no presumptions are to be indulged in against the existence of a law defining and punishing an offense. On the contrary, if an evil exists, and by a fair interpretation such evil is found to be within the spirit and intent of an act affording a remedy against it, courts are to apply such remedy in a spirit of liberality, and not by any narrow rule of construction defeat the object and purpose of the law; more especially should this be the guide where the mischief is within the words of the act.

That the acts charged in the indictment before us constitute an evil against which some remedy is necessary, will not be doubted.

It will be seen that very respectable authority has held that the word "claim" in the statute includes a claim for lands—"bounty lands." That is in substance a claim of a right to acquire title to some portion of the public domain, under and by virtue of the law of Congress granting bounty lands to certain classes of persons who have complied, and can comply with the conditions upon which the grant is to become operative as to them. A claim to

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pre-empt the public lands, is a claim of a right to acquire title to some portion of the public domain, under and by virtue of the pre-emption laws of Congress allowing such title to be acquired by such persons as are qualified, and who do comply with the conditions upon which such privilege is granted.

It follows, the acts charged in the indictment to have been committed by the defendant, do constitute an offense within the meaning of the third clause of section 5421 U. S. Revised Statutes.

Our attention was called to the case of *United States v. Reese*, 4 Sawyer, 622, as holding a contrary doctrine to that in *United States v. Wilcox*. Upon an examination of that case it will be seen that the question of what constitutes a "claim," within the third clause of said section, was not before the court. Some remarks of the judge would indicate that he held views contrary to those expressed in *U. S. v. Wilcox*, while the case was before him at the circuit; but the case went to the Supreme Court and was reversed, and it is very significant that although the same judge delivered the opinion then, he expresses no opinion upon this point, but says, with reference to the ground relied upon in the circuit court, to wit: That the acts charged did not constitute any offense under the laws of the United States, which was the first ground in order of statement: "Upon the first of these we express no opinion."

We do not regard that case as authority against our position in this.

The judgment and order of the district court are reversed and the cause remanded.

Two other cases involving the same question were submitted at the same time with this, to wit: *United States v. Cameron*, and *United States v. Parsons*. The same order is made in each, except as in the other cases some of the courts are held to be bad, the order prepared provides particularly for their disposition.

Justices Kidder and Hudson concur.

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EDGEINGTON, C. J., *dissenting*—The main, and perhaps only question involved in this case, is whether a pre-emption claim is an “*account or claim*,” within the meaning of section 5421 of the Revised Statutes of the United States. If it is, the indictment is good, if not, the indictment is bad. It is claimed by the prosecution that “if an evil exists, and by a fair interpretation, such evil is found to be within the spirit and *intent* of an act affording a remedy against it, courts are to apply such remedy in a spirit of liberality, and not by any narrow rule of construction *defeat* the *object* and *purpose* of the law; more especially should this be the guide, when the mischief is within the words of the act.” If this indictment is to be tested solely by this rule, or by the older and more explicit rule of the common law which says, “the best and surest mode of expounding an instrument is by referring to the time when, and circumstances under which it was made,” let us examine the results. Sec. 5421 of the Revised Statutes was originally passed on March 3, 1823. While in certain cases persons were allowed to purchase land previously occupied by them, and this privilege was sometimes called the right or privilege of pre-emption, no general pre-emption law was passed for some years after 1823.

There had been some local pre-emption laws passed prior to that date, but I think none were in force at the date of the passage of Sec. 5421.

The lands have become more valuable within only a few years. If at the time of the passage of Sec. 5421, and for years thereafter, there were no pre-emption claims, either in law or in fact, can it be claimed that the rule of interpretation above cited, will apply to this case? Was this “within the mischief *intended* to be guarded against and within the words?”

Sections 2264, 2265, 2266, 2267, 2269, and 2270 of the Revised Statutes, cited to show the meaning of the word claim, were afterwards made assignable.

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each passed years after the section under which this case was brought, became a law.

So far as I am informed this is the first case (unless the case of the *United States v. Reese*, hereinafter cited is claimed to be one) ever brought into our courts, attempting to place this construction on this law; although this section has been enacted, and on the Statute books for nearly 60 years, and the pre-emption law has been in force, and frequently violated, for over 40 years.

While all the dangers and perils so urgently set forth by the prosecution may exist and may imperil the interest of the public, unless this new construction is given to the law, I apprehend greater dangers from a forced construction placed upon the laws by the courts to meet new emergencies.

The only case cited by the prosecution which can possibly have any weight in support of this construction, is the case of the *United States v. Wilcox*, decided by District Judge Hall in the Northern District of N. Y., and reported in 4 Blatchford, page 388.

And even that case in my opinion, upon a careful examination fails entirely as an authority to support the theory of the prosecution. That was a claim for a bounty land warrant. The judge, to be sure, uses the word bounty land; but the claim was solely and only for a bounty land warrant; and in that case the defense urged that the claim contemplated in the statutes was for money only, but Judge Hall held that it extended to and included the bounty land warrant.

The universal rule is that the expressions of courts in decisions are to be construed with reference to the question under immediate consideration. Lands were not under consideration, only land warrants. As early as 1812, it was expressly provided by act of Congress, that in all cases where parties should be entitled to bounty lands, warrants should be issued to them, and these were

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The Crimes Act of the United States every where uses the word bounty land warrant. See Sec. 5420 of the Revised Statutes. The decision of Judge Hall is undoubtedly correct as to this species of government obligations. The bounty land warrants were issued by the government and went into the market; were bought and sold like bankable paper, assigned in blank, and had a known commercial value.

Not so with pre-emption claims; they were never bought nor sold, no more than claims for promotion in the civil and military service of the government.

I must respectfully but most firmly dissent, in the interpretation by our courts of our penal statutes whereby the life or liberty of the citizen is involved, from the doctrine that, "A claim to exercise the right of pre-emption, or a homestead right, is too valuable, especially in this territory, where frequently now its perfection at once raises a man from poverty to comfort and sometimes almost affluence, to permit the unmixed evil to ensue of throwing open wide the door for fraud and putting these valuable lands at the mercy of the unscrupulous and rapacious speculator, if the law by any reasonable construction has interposed a barrier."

Chief Justice Bronson says "Courts of justice should take care that they are not misled by the hardship of a particular case, or by the passion or prejudice which may be excited against a particular individual, to make a precedent which would run counter to well established principles. It should never be forgotten that a wrong-doer, however great the wrong may be, has not forfeited all his rights, and although the individual may be entitled to no sympathy, care should be taken that the blow which destroys him does not inflict a wound upon Justice herself." Lord Tenterden is reported to have said, "Hard cases make bad law."

The court say in the *United States v. Reese*, reported in 5 Dillon, as follows:

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"It must be remembered that this is a penal statute, and it must therefore be construed strictly. In the office of the interpretation of statutes, courts, particularly in statutes that create crimes, must closely regard and ever cling to the language which the legislature has selected to express its purpose. And when the words are not technical, or words of art, the presumption is a reasonable and strong one that they were used by the legislature in their ordinary, popular, and general signification. Statutes enjoin obedience to their requirements, and, unless the contrary appears, it is to be taken that the legislature did not use the words in which its commands are expressed, in any unusual sense. Therefore, the law is settled in construing statutes; the language used is never to be lost sight of, and the presumption is that the language used is used in no extraordinary sense, but in its common, every day meaning. The legitimate function of courts is to interpret the legislative will, not to supplement it or to supply it. The judiciary must limit themselves to explaining the law; they cannot make it. It belongs only to the legislative department to create crimes and enjoin punishments. Accordingly, courts, in the construction of statutable offenses, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, as otherwise they may hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. (*United States v. Clayton*, 2 Dillon, 219.) Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused."

"And again, if this rule is violated," says Chief Justice Best, "the fate of the accused person is decided by the arbitrary discretion of the judges and not by the express authority of the laws."

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Chief Justice Marshall says, in delivering the opinion of the court in *United States v. Wiltberger*, reported in 5 Wheaton, page 96.

“To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.”

There are certain maxims which have been adhered to by courts for ages in interpreting doubtful words and phrases, and one of great authority is “The coupling of words shows their acceptance in the same sense.”

The coupling of the words of “accounts or claims” has a peculiar significance, and dispels any other theory than that they are in fact “*ejusdem generis*.”

The words “accounts or claims” are quite frequently associated or coupled together in the laws and in the opinions of the attorney generals, and in no other instance can it be assumed that the interpretation now claimed is even possible. “*Noscitur a sociis*.” “The meaning of a word may be ascertained by reference to the meaning of words associated with it.” This rule has long been relied upon by the courts in determining the intent of the law-makers in the use of words susceptible of different interpretations. The association of the word “accounts or claims” in this section was proper and logical. An account is a statement of charge in money and may have two sides to it, when a balance is finally struck in favor of one side or party in the account. “A claim sup-

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poses an unacknowledged right." See Smith's Synonyms. Consequently the propriety will appear of the association of these words to meet both kinds of demands against the government.

For the reasons above given, I do not think the opinion of Judge Hall, in the case of the *United States v. Wilcox*, throws any light on this question, except, perhaps, to show that the furthest limit any court has heretofore gone, is to include *land warrants* within the meaning of the word claims, for the reason, I think, that these land warrants (if not technically) are treated in the markets of the country as obligations of the government. The only reported case which throws any light upon this question, so far as I am informed, is the case of the *United States v. Reese*, reported in 4 Sawyer, U. S. Circuit Courts Reports, page 629. That case was tried before Mr. Justice Field, and he says in that case upon rendering the decision of the circuit court, after quoting Sec. 5421, being the section under which this indictment is brought: "The first paragraph covers the altering or forging of such instruments; the second paragraph, the uttering or publishing them as true; and the third their transmission or presentation to any office or officer of the government.

"Neither of them applies to an instrument forged for the purpose of obtaining a cession of land from the United States, or the confirmation of a claim to land alleged to have been granted by the Mexican government. There was no act of Congress which reached a case of this nature until the eighteenth of May, 1858, when an act was passed covering all cases of the altering or forging of documents or title papers, or uttering or publishing them as true, for the purpose of establishing against the United States any *claims* to land in California. That act was passed, it is believed, in consequence of the defects in existing legislation, suggested by this case of Limantour."

This case was reviewed in the Supreme Court of the United States, and reported in 9 Wallace, page 13. Mr. Justice Field, in

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rendering the decision of the Supreme Court says: "As a defense to this action, the defendant relied in the circuit court upon several grounds, the principal of which were these:

First. That the acts charged in the two indictments did not at the time of their alleged commission constitute any offense under the laws of the United States; and, as a consequence, that the indictments and all proceedings thereunder, including the requiring of bail for the appearance of the party indicted, were void.

Second. That if the indictments and proceedings thereunder were not void, the stipulation of August, 1857, for a postponement of the trials, released the sureties from liability on their recognizance; and,

Third. That the recognizance was void in embracing the amount required as bail upon both indictments.

The third ground here stated is not pressed in this court. The other two grounds are substantially the same which are urged here, differing only in their form of statement. Upon the first of these we express no opinion. Upon the second we are of opinion that the circuit court erred."

Thus it will be seen that while Mr. Justice Field had decided in the circuit court that the word claims in Sec. 5421, would not bear the interpretation now claimed in this case, the Supreme Court declined to review that portion of the opinion, and reversed the case upon another and different question.

Consequently the opinion of that eminent Judge as declared at the circuit, remains, so far as the question now under consideration is concerned, unreversed and authoritative.

But to follow the history of this case still further, while this question was before the United States courts in California, Congress was appealed to, and on May 18, 1858, passed a law expressly providing for the punishment of the false making, forging, or uttering any evidence of right, title, or *claim* to *lands* etc. See

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Sec. 2471 of the Revised Statutes. This section follows the general form of Sec. 5421, but embraces specifically claims to land, and is confined for some reason, by its terms to frauds committed in reference to lands in California. If the construction claimed by the prosecution in this case be correct, what was the necessity in 1858, for further legislation. Undoubtedly this law of 1858, as all proposed changes in the penal laws are, was fully considered by the judiciary committees of both houses, comprising some of the ablest lawyers in Congress. The law was then passed. This, to say the least, was a legislative construction of this very question now before us.

One of the ablest judges of the Supreme Court of the United States has decided this question, and his decision stands unreversed.

Congress has given to it its interpretation; the different departments of the government have accepted the doctrine for sixty years, and now we are called upon to reverse this uninterrupted series of authorities.

In my mind neither reason nor authority justifies the reversal.

The judgment of the District Court should be

AFFIRMED.

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UNITED STATES v. CROW DOG.

1. **SIoux TREATY: HAS FORCE OF LAW, WITHOUT LEGISLATIVE ENACTMENT.** The treaty of February 24, 1869, with the Brule Sioux band of Indians, as affirmed by the agreement of February 28, 1877, operated of itself without the aid of any legislative enactment, and is equal in vigor and strength to an act of congress.
2. **SAME: BRULE SIOUX: EXCEPTED OUT OF GENERAL PROVISIONS OF SEC. 2145.** The treaty and agreement take these Indians out of the exceptions contained in Sec. 2145, Revised Statutes, U. S., and confer upon the District Courts jurisdiction of crimes committed by one Indian against another upon their reservation. *
3. **EVIDENCE: WIFE INCOMPETENT AS A WITNESS.** The statute of the United States permitting a defendant to testify in his own behalf makes no provision for the wife testifying; and in the absence of a statute expressly allowing a wife to testify for her husband in a criminal case, she is not a competent witness.
4. **SAME: TERRITORIAL STATUTE: HAS NO APPLICATION.** The provisions of the code of criminal procedure of this Territory making the wife a competent witness for her husband have no application to the District Courts when exercising the jurisdiction in cases, in which the United States is a party, under the laws of congress.
5. **SAME.** These provisions of the code of criminal procedure apply only to cases prosecuted in the name of the Territory for violations of its laws, in the courts for counties and judicial sub-divisions.
6. **HOMICIDE: PRESUMPTION: MURDER.** The deliberate and willful killing of one human being by another, with a deadly weapon, with intent to kill,—no other facts appearing—raises a presumption that the killing is murder.
7. **SAME: SELF DEFENSE: BURDEN OF PROOF.** Upon a trial for murder, the commission of the homicide by the defendant being proved, unless the evidence of the prosecution tends to show that the killing amounts only to manslaughter or was excusable or justifiable, the burden is on the defendant to establish self defense,—not beyond a reasonable doubt, but by a preponderance of the evidence.
8. **BURDEN OF PROOF: AFFIRMATIVE DEFENSE: REASONABLE DOUBT.** When the burden of proof is on the defendant to establish such affirmative defense, it is not sufficient to warrant an acquittal, for him to raise a reasonable doubt as to whether the killing was justifiable, or excusable.
9. **REASONABLE DOUBT: DOCTRINE OF HOW APPLIED.** The doctrine of reasonable doubt in such a case should be applied to the whole proofs and the whole case. Then the proofs, and presumptions and inferences arising therefrom, are all taken into account.

* Reversed as to this point in, EX PARTE CROW DOG, 109 U. S., 556.

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Writ of error to the First Judicial District Court.

A. J. Plowman, for defendant, plaintiff in error. Points and authorities cited:

The federal jurisdiction of these courts is vested in them by section 1910, R. S., and is limited to cases arising under the Constitution and laws of the United States. This case did not arise under the Constitution, and did not arise under any law passed by Congress, and section 1910 gave no jurisdiction: 1 Dill., 277; 7 Branch, 32; 13 How., 518; 5 Otto, 670; 1 Pet., 511-546; 5 Dill., 413; 2 Dill., 226.

The treaty of 1869 was made by the President and ratified by the Senate. R. S., U. S., p. 26, Sec. 2, ¶ 2, gives the power to create courts in a territory, and to give and take away jurisdiction, and Congress can only do this by a law: 1 Dill., 227; 11 Wall., 620-21.

Jurisdiction of a crime cannot be given by consent. No nation can make a treaty without itself possessing the right of self government: 6 Peters, 580-83; 5 Peters, 555; 5 Dill., 398; 5 Pet., 1; 6 Pet., 546-91-92-95; 19 How., 403; 5 Pet., 27.

Indians maintaining their tribal relations possess and exercise the right of self government: 1 Dill., 348, note and authorities above cited.

If these treaties make these Indians subject to the jurisdiction of the United States, then under the 14th amendment to the U. S. Constitution (U. S. Statute p. 31, Const. Art. XIV) they become citizens.

If they were subject to its jurisdiction before the treaty, then the United States was making a treaty with her own citizens. Upon citizenship, see 4 How., 572; 11 Wall., 616-621; 1 Dill., 264-346; 5 Dill., 390-894; 3 Pet., 126-155; 16 Wall., 73-93-

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95—126—129; *contra*, 2 Saw., 119; 19 How., 403; 6 Saw., 406; 5 Wall., 737; and the treaty gave the court no new power or jurisdiction.

A treaty is not binding upon the courts, except it is complete in itself and requires no legislation to carry its provisions into effect: *Ware v. Hylton*, 3 Dill., 272—276; *Foster v. Neilsen*, 2 Pet., 314; Paschals Const. U. S., p. 249, ¶ 240.

This treaty does not operate of itself to give jurisdiction. Under the treaty of 1868, Congress could not interfere with the rights of these Indians, except in cases purely political: 5 Dill., 409, and cases cited.

A treaty is the supreme law of the land, so far as it affects the United States and her citizens. But can the courts of the United States compel individual citizens of the other contracting party to fulfill the stipulations of their nation? If they fail the government may abrogate the treaty and go to war, but courts are powerless; it is a political question—not a judicial one: 5 Dill., 409. In the intercourse laws we control our own citizens, not the Indians: 6 Pet., 592.

If the Indians may make such treaties they can abrogate them. The courts could not punish for this.

The witness, Pretty Camp, was excluded because she was the wife of the defendant. The same rule should apply as in the territorial courts, and our Criminal Procedure is applicable: 2 Mont., 488; 2 Mont., 252; 18 Wall., 648; 2 Col., 201—6; 13 Wall., 444; 2 Black, 499; 1 Wall., 77; 11 Wall., 610.

Evidence did not show marriage or continued cohabitation. All witnesses are presumed competent until the contrary is shown: 59 Pa. St., 281; 1 Phila., 179; 2 do., 114; 55 Cal., 232.

Apparent danger is a mixed question of law and fact: 52 Miss., 23; 35 Ark., 601—2.

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Where the defendant sets up no distinct and independent defense, but contends that upon the facts and circumstances proved by both sides he is not guilty, the burden is on the prosecution to satisfy the jury that its whole case is made out: 1 Whart. Cr. L., Sec. 707, a., and cases there cited; 1 Col., 437-453; 5 Nev., 132; 43 N. H., 224; 26 Me., 316; 26 Me., 312; 10 Mich., 212; 33 Iowa, 270; 1 Gray, 61; 3 Greenl'f Ev., Sec. 30, p. 31; 28 Ala., 693; 16 N. Y., 58; 24 Cal., 230; 1 Nev., 543; 31 Ill., 385; 12 Ind., 670; 8 Ind., 439; 18 Wall., 516-545; *Henderson v. State*, 14 Tex., 503; *State v. Neuman*, 7 Ala., 69; 32 Ala., 573; 1 Nev., 454; 24 Pick., 373; 2 Met., 340; 9 Met., 126; 1 Met., 270; 5 Met., 181; 66 Mo., 181; 5 Iowa, 433; 53 N. Y., 164; 19 Me., 400; 13 Pick., 69; 25 Kan., 182; 6 Cush., 346.

Hugh J. Campbell, U. S. Attorney, for defendant in error.
Points and authorities cited:

Letter from Secretary Kirkwood, of date August 22, 1881, to Attorney General MacVeagh, expressing the opinion that the federal side of the territorial court has jurisdiction of the crime charged, and requesting that the U. S. Attorney for Dakota be directed to institute a prosecution. Letter of Attorney General in reply of date August 25, 1881, concurring in the views expressed by the Secretary of the Interior. Letter of date August 24, 1881, from Attorney General to the U. S. Attorney for Dakota, directing a prosecution in this case.

Upon the question of jurisdiction in this case, cited: Vol. 15, Stats. at Large, p. 635, Art. 1; Vol. 19 id., p. 254.

Without any act of Congress the treaty of 1868 was the supreme law of the land, and equivalent to an act of the Legislature: *Foster v. Neilson*, 2 Peters, 314; *U. S. v. Forty-three Gals.*, etc., 3 Otto, 188.

Power of Congress over Indians: *U. S. v. Rogers*, 4 How.

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572; Rev. Stats. p. 74; act June 24, 1874; Vol. 18, Stats. at L., p. 318.

A general law cannot repeal by implication a special law or a treaty: *McCartee v. Orphan Asylum*, 9 Cow., 437; Sedgw. Const. Lim., Sec. 5596, Rev. Stats. U. S.

The wife was not a competent witness for or against her husband at common law: *Wilkie v. People*, 53 N.Y., 527; *Stein v. Bowman*, 13 Pet., 221. See further: 2 Kent, 128; *People v. Carpenter*, 9 Barb., 582; *Carpenter v. White*, 46 Barb., 292; 1 Greenleaf, 335-341-407; *Bird v. Houston*, 10 Ohio Stat., 429; *State v. Waterman*, 1 Nev., 549; *Fitch v. Hill*, 11 Mass., 286; Whar. Cr. Ev., Sec. 390; *Gibson v. Cone*, 57 Pa.; *Kennedy v. People*, 37 Ind.

The fact that the law makes parties witnesses in their own behalf does not affect the rule as to man and wife: *Steen v. State*, 20 Ohio Stat., 333; *State v. Waterman*, 1 Nev., 543; *Darby v. Ayres*, 23 Cal., 108.

Indian marriages are good common law marriages, and valid in this Territory: *Meister v. Moore*, 6 Otto, 76; *Watt v. Williamson*, 8 Ala., 48; *Davis v. Davis*, 7 N. Y., (Daly) 308; *Boyer v. Divly*, 58 Mo., 510; Civil Code, p. 239, Title 1, Chap. 1, Art. 1 Sec. 42; *Hutchins v. Kimmel*, 31 Mich., 127.

The territorial legislature has no power to enact laws regulating the competency or admissibility of evidence in cases in which the United States is a party. The only jurisdiction over defendant and the crime charged is that conferred by the Congress. Judicial jurisdiction is coextensive with legislative jurisdiction, and can go no further: Sec. 711, Rev. Stats.; *U. S. v. Cornell*, 2 Mason, C. C.

The territorial laws do not, on their face, purport to control such cases as this, but are expressly confined to cases in which the territory is a party: Civil Code, p. 510, Secs. 13-14-15-16-17;

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Code Crim. Proc., p. 920, Sec. 610; *U. S. v. Adams*, 2 Dak., 305; *U. S. v. Beebe*, 2 Dak., 292.

This matter has been expressly left to the common law: Code Crim. Proc., p. 920, Sec. 610.

The law on the question of burden of proof has been laid down by the Supreme Court of this Territory in the following cases: *Territory v. Gay*, 2 Dak., 125; *U. S. v. Knowlton*, 3 Dak., 58; and in the following cases in other supreme courts, as given by the court in this case: *Silvus v. State*, 22 Ohio St., 90; *People v. Schryver*, 42 N. Y., 1; *Patterson v. People*, 46 Barb., 625; *People v. Stonecifer*, 6 Cal., 405; *State v. Neeley*, 20 Iowa, 108; *People v. Arnold*, 15 Cal., 476; *Com. v. York*, 9 Metcalf, 93; *People v. McLeod*, 1 Hill., 377; *People v. Cottral*, 18 John., 115.

Moody, J.—The defendant, an Indian, called in English Crow Dog, was convicted in the First District Court of the crime of murder, and brings the record here by writ of error.

The first and most important question which confronts us, arises upon the objection of the defendant to the exercise by the District Court of jurisdiction over him and of the crime for which he has been convicted.

It appears from the transcript, that the defendant and the person killed were Indians, belonging to the Brule Sioux Band of the Sioux Nation of Indians. That the killing took place at their agency upon the Great Sioux Indian reservation, in the First Judicial District of this territory, in August 1881.

The act of Congress (Rev. Stat., Sec. 2145.) extending the crimes act to the Indian country contains, in Sec. 2146, these exceptions: "It shall not extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country, who has been punished by the local law of the tribe, or to any case where

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by treaty stipulation the exclusive jurisdiction over such offense is, or may be secured to the Indian tribes respectively."

If this prosecution rested solely upon such general act of Congress it would be apparent it could not be sustained. But it does not so rest.

By the treaty made with this band of Indians, of which both the defendant and the deceased were members, proclaimed February 24, 1869, (15 Stat. 635) it was expressly provided that, "if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white black or *Indian*, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong doer to the United States to be tried and punished according to its laws."

This treaty has frequently been recognized by Congress as of binding force, and so far as the portion quoted is concerned, it has never been abrogated or repealed. On the contrary by reference to Article 8th of the agreement made with the same tribe of Indians, approved by act of Congress of February 28, 1877, (19 Stat., 254) it will be seen that its provisions are expressly continued in force, and a positive guarantee given these Indians of protection through the enforcement of the laws of the United States. And in such subsequent agreement a clear and plainly expressed submission of the Indians to the jurisdiction of such laws is provided for. The language is this. "The provisions of the said treaty of 1868 "(proclaimed February 24, 1869)" except as herein modified, shall continue in full force. "They (the said Indians)" shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person and life."

The person for the killing of whom this defendant is convicted, Spotted Tail, signed the treaty of 1868, and the subsequent

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agreement. He was the principal Chief of the Brule Sioux band, and while submitting himself and his people to the jurisdiction and laws of the United States, and covenanting that they should be tried and punished according to such laws, for wrongs done by them to any person, including Indians, he at the same time secured the solemn guarantee and plighted faith of the government, of such protection as the enforcement of its laws would afford.

That this treaty and this agreement possess the force of law, and are equal in vigor and strength to an act of Congress, will scarcely be questioned.

Chief Justice Marshall in *Foster v. Nielson*, 2 Peters, 314, says: "A treaty is to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision."

Clearly, this treaty and agreement so operate. The laws of Congress provide for the punishment of persons committing murder in the Indian country, and for the trial of offenders charged with such crime.

The exception of Indians committing crimes against other Indians is general. This treaty and agreement take these Indians out of such exception, and apply to them the general rule. Any other view would deny them the right guaranteed by solemn treaty, and would make the covenant of the government a mockery.

It is significant that the Department of the Interior, the department of the government having these very Indians in charge, after advising with the Department of Justice, and after a careful consideration of the question by the able heads of those departments, has instituted and directed this prosecution.

While we fully recognize the ultimate responsibility of this Court in determining the law upon this subject, this fact ought to have great consideration and weight. It plainly shows the construction

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put upon this treaty and the agreement, by the Department of the government under whose auspices they were made.

Without further elaboration we think it clear that the jurisdiction of the District Court over the person of the defendant and the crime alleged against him, should be sustained.

The same remarks will apply to the offer of the defendant's counsel to prove that, in some way not stated, the defendant was punished by the tribe. If he is subject to be tried and punished according to the laws of the United States, then he is taken as clearly out of the second exception as the first.

The next question in importance relates to the competency of a witness offered on behalf of the defendant upon the trial.

An Indian woman named Pretty Camp was called as a witness by the defendant. It was proven, and is practically conceded, that she was the defendant's lawful wife. Upon the objection of the United States Attorney she was excluded from testifying, and this is assigned as error.

It is an undoubted rule of the common law, that the wife is not a competent witness for her husband in such a case as the one at bar.

The statute of the United States makes the party defendant in a criminal action a competent witness in his own behalf at his own volition, but makes no provision for the wife testifying.

In the absence of a statute expressly allowing a wife to testify for her husband in a criminal action, she is not a competent witness for him.

Neither the removal of the disability of interest, nor the allowing of a defendant to testify in his own behalf in a criminal action makes the wife a competent witness.

The removal of the disability of interest, or allowing a prisoner to testify, in no way weakens the reasons upon which the rule of excluding the wife was grounded.

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This appears to be the uniform holding:

Wilke v. People, 53 N. Y., 527; *Lucas v. Brooks*, 18 Wall., 436; *People v. Reagle*, 60 Barb., 527; *Bird v. Houston*, 10 Ohio St., 429; *Steen v. State*, 20 Ohio St., 333; *Kennedy v. People*, 37 Ind., 353; *State v. Waterman*, 1 Nev., 543; *Wharton Cr. Evidence* Sec. 400—437.

In *Wilke v. People*, Folger J., says: "The wife of a prisoner was not a competent witness in a criminal action or proceeding against him. This is the rule of the common law, and can only be abrogated by statute."

Mr. Justice Strong, in *Lucas v. Brooks* says: "The objection to a wife's testifying on behalf of her husband, is not, and never has been that she had any interest in the issue to which he is a party. It rests solely upon public policy."

But it is claimed in this case that the rule of the common law is abrogated by the provision of the Code of Criminal Procedure of this territory, which by its reference to the Code of Civil Procedure, makes a wife a competent witness for her husband.

This court has repeatedly held that such criminal Code did not and was not intended to apply to the courts while exercising the jurisdiction under the laws of Congress, in cases in which the United States is a party, and sitting for the whole district. It has sole reference, by express terms, to criminal actions and proceedings in which the territory is a party. It would be wholly impracticable to apply many of its provisions to the courts while sitting for the entire district in United States cases. Besides, as we have had occasion heretofore to say, the territorial statute does distinctly recognize other rules of practice and proceedings peculiar to the district courts for the district in federal cases;

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and which rules are well known to the profession, and are so far as applicable the rules of the common law. It may be doubtful whether, in the absence of express authority by Congress, it would be competent for the territorial legislature to prescribe rules of evidence and of competency of witnesses in cases in which the United States is prosecuting. Serious doubts could be suggested whether this is among the implied powers conferred in authorizing legislation upon all rightful subjects, especially as Congress itself has undertaken to act, and has made the party prosecuted competent but has not changed the rule as to the wife. However that may be, the territory has not undertaken thus to legislate. Its legislation upon this subject is confined to those cases prosecuted in the name of the territory, for a violation of its laws, and in the courts for the counties and subdivisions.

Such a radical change in the rule of competency of witnesses cannot be recognized by the courts upon any doubtful construction of a statute. The change must be clearly and unequivocally expressed.

We do not wish to be understood as holding that the District Courts are precluded from following the provisions of the Code of Criminal procedure in United States cases, where it is applicable. They may do that with propriety, because it embodies in many of its provisions the practice of the common law, and that practice which the courts sitting for the whole district in United States cases, have followed for nearly twenty years, and ever since the organization of courts in the territory.

The remaining question which will be noticed, arises upon the exception to the charge of the District Court on the burden of proof.

The evidence is all preserved and brought in the transcript here. That for the prosecution discloses a willful and deliberate killing with a deadly weapon with intent to kill, and without any facts

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of justification, excuse or mitigation appearing from such evidence. The defendant's own statement tends to prove a killing in self defense; but he was unsupported by other proofs, and his statement was met by the prosecution by rebutting evidence. The case being thus, the jury were instructed by the court, that the willful and deliberate killing of one human being by another, with a deadly weapon with intent to kill, nothing else appearing, raised a presumption that the killing was murder. They were further instructed that if the evidence of the prosecution, standing alone, showed that the killing was under such circumstances as constituted murder, and the defendant sets up the defense of excusable homicide by reason of the killing being in self defense, the burden was upon the defendant to establish that fact—not beyond a reasonable doubt, but by a preponderance of the evidence. That the presumption arising from the willful and deliberate killing with a deadly weapon with intent to kill, would remain until over come by proof of facts which showed the killing to be justifiable or excusable, or which would mitigate it to manslaughter. Incorporating into his charge the words of the territorial statute the court said, "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was excusable, or justifiable."

At the same time particular care was taken by the Court to instruct the jury that upon the whole evidence they must be satisfied of the defendant's guilt beyond a reasonable doubt before they could convict. And also if they had a reasonable doubt of which of the two degrees of criminal homicide he was guilty, they must give him the benefit of such doubt and convict, if at all, of the lesser, to wit, manslaughter.

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We understand the principle of law involved to be this. The killing under the circumstances stated raises a presumption of guilt, which presumption, where no facts in justification, excuse or mitigation appear in the evidence for the prosecution, must remain until proof sufficient to overcome such presumption shall be given by the defendant, and that the proof does not overcome such presumption if it exactly balances with the rebutting proof of the prosecution upon those facts, or if the weight is against such justification, excuse or mitigation. It is not enough to raise a reasonable doubt whether such justification or mitigation be proven, for the presumption still remains. To apply the doctrine of reasonable doubt in that way to a defense, would be trifling with the sanctity of human life.

The doctrine of reasonable doubt should be applied to the whole proofs and to the whole case. Then the proofs, and the presumptions and inferences arising therefrom, are all taken into account.

Self defense when set up by a defendant to excuse or justify a homicide is an affirmative defense, and to say that the prosecution must negative such an affirmative defense by negative proof sufficient to show beyond a reasonable doubt that it is not true, is stating an absurdity.

The rule of law embodied in the charge of the District Court is sustained by the overwhelming weight of authority; and may be regarded as the settled law of this country.

Foster's Crown law. 255; *People v. Schryver*, 42 N. Y., 1; *People v. Milgate* 5 Cal., 127; *Silvus v. State*, 22 Ohio St., 90; *State v. Neeley*, 20 Iowa., 108; *Com. v. York*, 9 Metcalf, 93.

Some other minor questions are presented in the brief of the able counsel for the defendant, but the ones here discussed are the ones pressed upon our attention on the oral argument, and all we deem necessary to a proper understanding of the case.

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No error appearing in the record the judgment of the District Court is affirmed, and the cause remanded with directions to carry the judgment into execution.

All of the Justices concurring.

THE TERRITORY V. EGAN.

1. CHANGE OF VENUE: APPLICATION FOR: SUFFICIENCY OF. An affidavit for a change of venue must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had. The Court must be satisfied from the facts sworn to, and not from the conclusions to which defendant or his witnesses may depose. Affidavit held insufficient.
2. EXPERT EVIDENCE: DIRECTION OF BLOWS: INSTRUMENT USED. Testimony of a medical expert as to the direction from which blows were received, and the character of the instrument with which injuries were inflicted, is competent upon a trial for homicide.
3. EVIDENCE: DIAGRAMS OF PLACE. Diagrams of the premises where a homicide occurred are admissible in evidence after the proper foundation has been laid by showing their accuracy and the skill of the person who prepared them.
4. SAME: BLOODY INSTRUMENT FOUND NEAR SCENE OF HOMICIDE. It having been shown that wounds upon deceased may have been produced by a blunt instrument, and that a bloody, wooden picket-pin was found near the scene of the homicide, and shortly thereafter, with human hairs adhering thereto of a length and color corresponding with that of deceased—held, that such instrument might properly be exhibited to the jury in evidence.
5. SAME: DECLARATIONS OF DEFENDANT: THREATS OF ARREST. Declarations made by defendant, not amounting to a confession or denial of his guilt but from which, when taken in connection with surrounding circumstances, an inference of guilt might be drawn; such declarations being made in excitement and fear of arrest, and after threats of arrest, simply, no other threats being made and no inducements held out—held, clearly admissible in evidence.
6. MALICE: DEFINITION OF: APPLICABLE TO CRIME OF MURDER: PREMEDITATED

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DESIGN. Section 772 of the Penal Code of this Territory may properly be applied as a definition of the element of malice in the crime of murder, and is not inconsistent with premeditated design necessary to constitute criminal intent.

7. **SAME: PRIOR ILL TREATMENT: EVIDENCE OF.** Evidence of threats, menaces and ill treatment during the life time of deceased, is competent as tending to prove malice.
8. **CIRCUMSTANTIAL EVIDENCE.** There is no ground for distinction between circumstantial and direct evidence. The evidence of circumstances is to be taken the same as evidence of direct and positive acts; and considering the whole instructions on this point, and the facts involved, it was held proper to so instruct the jury.
9. **CREDIBILITY OF WITNESSES: INSTRUCTIONS TO JURY AS TO.** The jury in testing the credibility of a witness are to take into consideration the facts, circumstances and surroundings of the case, and whether he has been corroborated by other witnesses; and are not to discredit a witness from mere wanton opinion that he is to be disbelieved, or a mere imaginary idea of his want of credit; and when so qualified, an instruction that "under any and all circumstances a witness's character may be tested by the party against whom that witness is brought, by proof of his general character for truth and veracity in the community where the witness resides,"—held, not erroneous.
10. **SAME.** An instruction to the jury in these words, "I don't say to you that you are bound to believe a witness who testifies to a material fact that is wholly uncontradicted, but there is nothing that requires you to discredit a witness who testifies to a material fact uncontradicted, and especially if another witness testifies to the same fact,"—held, not erroneous.

Writ of Error to the Minnehaha County District Court.

All facts necessary to understand the points decided are stated in the opinion.

Winsor and Swezey, for plaintiff in error. Points and authorities cited:

An application for change of venue under our statute, is not addressed to the mere discretion of the Court. The statute implies an examination of evidence, and action as warranted by the

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facts: *People v. Yoakum*, 53 Cal., 566; *Birdsong v. State*, 47 Ala., 68; Green's Crim. Rep., Vol. 1, 728; *State v. Canada*, 48 Iowa, 448.

The evidence of Dr. Allen, as to the direction from which blows were received, was not competent as expert testimony: *Kennedy v. The People*, 39 N. Y., 245; *Dillard v. State*, 58 Miss., 368.

The only evidence in the case from which the jury might have inferred an attack upon the woman unawares, and in a deliberate and stealthy manner, is this expert testimony of the doctor, that these blows may have come from the rear. And if the evidence was material here, as was held in the Kennedy case, as affecting the degree of homicide, the error should not be disregarded.

It was error to receive in evidence the declarations of defendant testified to by Van De Mark and Van Horn. Where such declarations are made to a person in authority, it must affirmatively appear that the same were entirely voluntary: *People v. Barrie*, 49 Cal., 342; *State v. Walker*, 34 Vt., 296; *State v. Diddy*, 72 N. C., cited in 82 N. C., 594; *Com. v. Curtis*, 97 Mass., 574; *Vaughan v. Com.*, 17 Grat., 576; *People v. McMahon*, 15 N. Y., 384; *People v. Phillips*, 42 N. Y., 200; *Flagg v. People*, 40 Mich., 706; *Conley v. State*, 12 Mo., 303; *Lacey v. State*, 58 Ala., 385; *Barnes v. State*, 36 Tex., 356; Wharton Crim. Ev., 650-1, and cases cited; Greenleaf Ev., Vol. 2, 219-22.

It is doubtful whether *malice aforethought*, as known to the common law, is equivalent to premeditated design: *Hogan v. State*, 36 Wis., 226; *State v. Boyle*, 28 Iowa, 522; *State v. Curtis*, 70 Mo., 594; *Hawthorne v. State*, 58 Miss., 778. And mere malice is an entirely different matter in law from premeditated design.

It was error to instruct the jury that there is no distinction between circumstantial and direct evidence, whether considered in

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its nature or its effect. This is not correct law: *People v Cronin*, 34 Cal., 191; *State v. Norwood*, 74 N. C., 247; *Greenleaf's Ev.*, Sec. 13; *Taylor's Ev.*, Sec. 56; *Best's Ev.*, Sec. 295; *Wills on Circum. Ev.*, 313; *United States v. Ross*, 92 U. S., 281.

It was error to instruct the jury, in effect, that under any and all circumstances the defendant had the right to test the character of a witness called by the prosecution, by proof of his general character for truth and veracity in the community where the witness resides. The criminal law allows no inference against a prisoner from the omission to do what he had a right to do: *People v. Tyler*, 36 Cal., 522; *People v. Brown*, 53 Cal., 66; *Wharton's Cr. Ev.*, 435, 435, a.; *Ormsby v. The People*, 53 N. Y., 472; *State v. Kabreck*, 39 Ia., 277; *State v. Dockstater*, 42 Ia., 432; *State v. Collins*, 20 Ia., 85; *White v. State*, 31 Ind., 262; *Doan v. State*, 26 Ind., 495; *Clem v. State*, 42 Ind., 420.

The instruction of the Court, "but there is nothing that requires you to discredit a witness who testifies to a material fact uncontradicted, and especially if another witness testifies to the same fact," is erroneous. It shuts out of view every element of discredit except *contradiction*, no matter in how many other ways a witness may have been discredited on the trial. And an erroneous instruction is not cured by a correct one on the same point, as it is impossible to determine on which instruction the jury acted: *People v. Anderson*, 44 Cal., 65; *People v. Valencia*, 43 Cal., 552; *Bradley v. State*, 31 Ind., 492; *Kirland v. State*, 43 Ind., 146; *Kinger v. State*, 45 Ind., 518; *Remsen v. People*, 43 N. Y., 6; *Cancemi v. People*, 16 N. Y., 501; 58 Miss., 778; unless the error is conclusively shown to be harmless: *Coleman v. People*, 58 N. Y., 555; *People v. Bennett*, 49 N. Y., 137; *State v. Wilner*, 40 Wis., 304; *Rice v. Heath*, 39 Cal., 609; *Sweeney v. Reilly*, 42 Cal., 402.

J. W. Carter, District Attorney, and *E. Parliaman*, for defendant in error. Points and authorities cited:

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Upon an application for change of venue *facts* must be shown sufficient to satisfy the Court that a change is necessary to secure a fair and impartial trial: Code, p. 879, Sec. 285; *Maton v. People*, 15 Ill., 536; *Mack v. State*, 32 Miss., 426; *State v. Miller*, 15 Minn., 370; *State v. Stokely*, 16 Minn., 282; *Dillard v. State*, 58 Miss., 368; 28 Cal., 495; 18 id., 186; 1 id., 383; 44 id., 95; 23 id., 566.

The mere fact of defendant being under arrest, or threatened with arrest, at the time of a confession, is not ground for exclusion of such evidence: *People v. Rogers*, 18 N. Y., 9; *Hartung v. People*, 4 Park., 319; *People v. McCollister*, 1 Wheeler, C. C., 392; *People v. Thayer*, 1 Park., 595; 5 Park., 376.

Fright, excitement, or agitation consequent upon arrest, no threats or inducements being used, will not exclude confessions: *Lamb's Case*, 2 Leach, C. C., 625; 3 Parker, 256.

Where guilty knowledge or intent is an essential element of the crime charged, evidence of facts which tend to establish such knowledge or intent is competent, notwithstanding it may show distinct crimes: *Bottomly v. U. S.*, 1 Story, 135; *Dunn v. State*, 2 Pike, 229; 2 Russel on Cr., 777; Dennis, 574; 3 Parker, 681; 20 Iowa, 582; 1 Greenleaf Ev., Sec. 53; Wharton, C. L., (7 Ed.) 631-5; Wharton Hom., 701.

Malice signifies the intent from which flows any unlawful and injurious act committed without legal justification: 15 Pick., 337; 9 Met., 410; 4 Ga., 14; 33 Me., 331; 7 Ala., (N. S.) 728; 2 Chitty Cr. L., 727; 3 id., 1104.

The entire charge of the Court as to circumstantial evidence correctly embodies the law: 1 Greenleaf Ev., 13, a. n.; 1 Parker Cr. Rep., 598.

KIDDER, J.—The defendant in the court below was convicted at the November term of the District Court, within and for the

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subdivision composed of the counties of Minnehaha and McCook, A. D. 1881, of murder,—the killing of his wife, Mary Egan.

(1.) The first error assigned was the overruling the motion for a change of venue, under section 285, Criminal Procedure, upon the ground that a fair and impartial trial could not be had in this subdivision. This motion was based—*first*, upon the affidavit of the defendant; and, *second*, upon the affidavits of the publishers of three newspapers published in Sioux Falls, in the county of Minnehaha, viz: The publisher of the *Times*, the *Pantagraph* and the *Independent*.

The affidavit of the defendant stated that he had made diligent inquiry through friends and counsel and was informed by them and believed that a prejudice existed to the extent that he could not have a fair and impartial trial.

It also further stated that certain persons, the two Van Hornes and one Van Demark, were unfriendly and hostile towards, and had been active in influencing the prosecution against him; and that some of the friends of the deceased, consisting of certain prominent families residing in the village of Sioux Falls, in which the deceased had worked at times prior to the homicide, had made denunciatory statements against the defendant.

And it also appeared by affidavits that some 1,450 copies of the papers before mentioned were in circulation in the two counties, and that fourteen of the jurors drawn from Minnehaha county were or had been regular subscribers for these papers.

This was, in substance, the showing made by the defendant in support of his motion.

In opposition, the prosecution presented counter affidavits of several prominent citizens of extensive acquaintance throughout these counties, which contained positive averments, "that there had never been any public excitement in said counties concerning the action, and that there is not any public prejudice in either

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“of said counties against the defendant which would prevent a fair and impartial trial.”

This section (285) provides that criminal actions, when the offense charged in the indictment is punishable with death or imprisonment in the territorial prison, may at any time before trial is begun, be removed from the court in which it is pending, on the application of the defendant, whenever it shall appear to the satisfaction of the Court, by affidavit, (or if the Court should so order, by other testimony,) that a fair and impartial trial cannot be had in such county or subdivision.

This statute differs but slightly in language from that of the California (Penal Code, 1095,) but is clearly capable of receiving the same construction, as the meaning and requirements are unquestionably the same. The one says, “whenever it shall *appear* to the *satisfaction* of the Court by affidavit;” and the other says, “if the Court be *satisfied* that the representation of the defendant “be true,” etc., the removal may be made.

In the case of *People v. Congleton*, 44 Cal., 95; in *People v. Thaler*, 28 Cal., 495; in *People v. Mahoney*, 18 Cal., 186, and in *People v. McCauly*, 1 Cal., 383, the character and sufficiency of the affidavit filed for a change of venue, under the Statute, were considered and passed upon; and as was also in that of the *People v. Yoakum*, 53 Cal., 566. In the latter case the Court defined the correct rule of practice to be observed in applications of this character, and the requisites of the affidavits to be the same as set forth in the case of *People v. McCauly*, above cited, which case was cited by counsel for defendant: “That the affidavits must state “the *facts* and *circumstances* from which this conclusion is deduced, that a fair and impartial trial cannot be had; the Court “must be *satisfied* from the facts *positively* sworn to in the affidavit and not from a general *conclusion* to which the defendant “may swear or which his witnesses may depose they verily *believe* “to be true.”

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The only positive averments in the affidavits of defendant in this case were as to the hostility and efforts of the three witnesses, Van De Mark and the two Van Hornes, and the unfriendly utterances of some of the friends of the deceased in Sioux Falls, which of themselves certainly are not sufficient to establish the fact of there being such a prejudice and bias existing against the defendant in the minds of the people in the counties of Minnehaha and McCook, as to prevent a fair and impartial trial. The affidavits of the three publishers were only as to the number of the circulation of their papers, and were silent as to the condition of the public mind or feeling. The exhibits accompanying the affidavit, (the newspapers containing the account of and comments upon the homicide published immediately after the occurrence,) either alone or with the affidavits, were not such facts as the rule contemplates and defines as essential to the sufficiency of an affidavit, and especially when the Statute (Code of Criminal Procedure, Sec. 334,) expressly asserts that "no person shall be disqualified as a juror "by reason of having formed or expressed an opinion * * * * "founded upon rumor or *statements in public journals.*" Why should the Court ignore the theory of the statute, and conclude that newspaper statements published some eighteen months prior to the application for change of venue, had created such a bias and prejudice in the public mind that a fair and impartial trial could not be had?

The affidavit of the defendant in this case is clearly insufficient, and its deficiency is not aided or cured by the supplemental affidavits of the three publishers and the exhibits. And were it sufficient to establish a *prima facie* case for the defendant, the counter affidavits presented on the part of the Territory preponderate that of the defendant.

We think the rule established by the California courts, *supra*, the correct one, as well as the doctrine laid down in the *State v.*

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Stahly, 16 Minn., 282, which also declares that *facts* must be shown sufficient to satisfy the Court that it is *necessary* for a change to be granted in order to secure a fair and impartial trial. In the case at bar the defendant states in his affidavit that he was informed and believed "that a prejudice existed to the extent "that he could not have a fair and impartial trial." This is not sufficient.

(2.) The exception taken to the testimony given by Dr. Allen (who was at the inquest) in response to the question of the prosecutor, "From your examination, doctor, state from what direction the blows came that produced those wounds?" we think is not well founded. The case, *Kennedy v. The People*, 39 N. Y., 245, cited by the defendant's counsel, affirms this theory.

(3.) Neither was the question, "What in your opinion produced the mark or scar across the neck which you have spoken "of?" objectionable. The doctor was testifying as an expert and as an eye-witness what the dead body of the supposed murdered woman displayed to him as the cause, or one of the causes of her death, and the answer of the doctor as to the cause of the death, after it was established that death ensued through unlawful means, did not identify the defendant, Egan with the offense, or any person whatever.

(4.) The evidence of J. B. Hawley and the plats or diagrams offered and admitted in evidence on the part of the prosecution were competent and relevant. The foundation for their admission had been properly laid—Mr. Hawley was shown to have been a practical surveyor and civil engineer of several years experience—his competency to perform the survey and perfect the diagrams of Egan's premises where the homicide had evidently occurred, was clearly shown before his testimony and the introduction of his well prepared diagrams were admitted.

(5.) The objection to the introduction of the wooden picket-

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pin found upon the premises of Egan the day after the inquest, was not tenable. Dr. Olney, another expert, and as one, testified to the blood and hair upon the pin. The daughter of the deceased (Mrs. Van Horne) also testified as to the color of her mother's hair being the same as that upon the pin. Dr. Allen also previously in his evidence as to the nature and character of what he declared might have been fatal wounds, had testified that those wounds could have been made with an instrument blunt edged. This pin having been found so soon after the supposed murder and so near the scene of the tragedy and bearing marks that indicated its use in a manner that established at least a circumstance cotemporaneous with the possible means of the death of Mrs. Egan, was a fact sufficiently connected with the homicide to render it admissible and proper for the jury to consider.

(6.) As to the exception of the defendant in which the learned counsel has expressed "great confidence" as to the inadmissibility of the declaration of Egan at the time of his arrest, the record shows that James Van Horne, Frank Van De Mark and one Warran, all neighbors who were living in the immediate vicinity of Egan's premises, had been informed by "Tommy," a little son of the accused, that his mother was found dead in the cellar, and that his father had instructed him to apprise them (or his sister, Mrs. Van Horne, daughter of the deceased,) of the fact; that these men immediately repaired to the house of Egan, found no person there, and upon an examination of the cellar discovered the dead body of Mrs. Egan, bearing marks of violence and covered with blood; that upon their coming out of the cellar, Egan makes his appearance at the door; Van Horne turns and says: "Egan, what is up?" Egan threw up his hands and says: "What?" Van Horne again says: "Egan, what's up?" Egan replies: "Oh! Mary is dead." Van De Mark then says: "Egan, you know how she came into the cellar, and you might as well own it up," and told him they were going to arrest him, under such

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circumstances, without papers, to which Egan replies: "I can't go with you for there is no one to take care of the cattle."

The above is all the language claimed by either party to have been used or statements made by Egan at that time. The declarations of Egan are claimed by his counsel to have been inadmissible for the reason that his words gave no consistent account of his discovery of the body, showing no concern about her death, and were declarations from which guilt is to be inferred, and claiming in his argument that the declarations were induced by fear and threats.

The record shows no act on the part of Van De Mark, or either of the others with him at the time, that they did anything to intimidate him, to induce fear on the part of Egan, or held out any promise of favor. True, the evidence is that one of the party had a loaded gun in his possession, but no use was made of it, nor any threats or move made by the person carrying it to indicate its intended use against Egan. That confessions or declarations made by a party charged with crime to a person in authority must be *voluntary* to be admissible in evidence is not disputed, and the Court is to determine as to the admissibility. The language of Egan there used could not of itself be possibly construed as a confession. It was neither an admission nor a denial of the offense charged. It was a declaration or statement from which a person hearing might in connection with surrounding circumstances possibly infer guilt; and if made while under, or with threats of *arrest* simply, even if the person is excited or frightened on account of the arrest, there being no other threats and no inducements of favor or otherwise held out, they are clearly admissible.

(7.) As to the charge of the Court, wherein he says: "The law defines malice to be a wish to vex, annoy, or injure another, and the jury may consider the evidence, if any, introduced on the part of the prosecution as to threats, prophecies, menaces, or ill

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“treatment during the life time of deceased as to the question of malice.”

This includes the definition of malice as given by our Code, page 839, section 772; but it is claimed that this applies only in case of assault and battery, malicious mischief, or libel, or in any case in which malice is the gist of the offense, and as being inconsistent with premeditated design necessary to constitute criminal intent in murder.

The authorities are uniform upon the question of malice; although not in the exact language of our statute, they all define in substance malice to be that state of mind or act when one willfully does that which he knows will injure another's person or property; premeditation under our statute, not requiring any fixed period of time to establish its existence. If malice as above defined is once established and the commission of a crime follows, and is also proven, it is perpetrated with malice aforethought or premeditated design.

(8.) The charge relative to circumstantial evidence (and to which portion there were exceptions,) was: “The evidence of circumstances is to be taken by you the same as evidence of direct and positive acts. It is to be received by you in the light of reason—in the light of actual results. All evidence is more or less circumstantial. All statements of witnesses, all conclusions of jurors are the result of inference. There is no ground for distinction between circumstantial and direct evidence.” This we hold to be the law, and when considered with the evidence as shown by the record in this case, and further considering the whole, or the balance of the charge upon this point as given, it seems to have been a clear, plain and appropriate charge.

(9.) Defendant's counsel also excepted to a portion of the charge, which was as follows: “Under any and all circumstances a witness's character may be tested by the party against whom

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"that witness is brought by proof of his general character for truth and veracity in the community where the witness resides," claiming that it contained an unfavorable inference against the prisoner because he did not impeach the witnesses brought against him, by proof of their general character for truth and veracity. Whether this portion was objectionable or not, it should be considered with another part in the same connection, which was as follows: "You may take into consideration also that a witness has been corroborated by other witnesses. You are not to discredit a witness upon a mere imaginary idea of a person's want of credit. It is from the facts and circumstances—from the surroundings—that you are to judge of the credibility of witnesses, not from mere wanton opinion that a witness is to be disbelieved;" and, when so considered, the exception is not well taken.

(10.) He also excepted to the following charge: "I don't say to you that you are bound to believe a witness who testifies to a material fact that is wholly uncontradicted, but there is nothing that requires you to discredit a witness who testifies to a material fact uncontradicted, and especially if another witness testifies to the same fact." In our opinion, the reasonable construction and interpretation of this is, that the jury were thereby permitted, as the law declares them, to be the exclusive judges of all questions of fact, and that it was therein made plain to their comprehension that it was their province also to determine the weight of the testimony of all the witnesses.

This disposes of all the questions that were presented to us on the argument for our consideration. There appearing to be no error in the record, the judgment of the court below is

AFFIRMED*

All the Justices concurring.

*The defendant, Thomas Egan, was re-sentenced, and at Sioux Falls, on the 13th day of July, A. D. 1882, was executed.

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UNITED STATES V. CAMERON.

1. **SECTION 5479, U. S. REVISED STATUTES: FORGERY STATUTE.** Section 5479 of the Revised Statutes of the United States, is designed to punish the forgery of the instruments therein named.
2. **PRE-EMPTION: FINAL PROOF: MAKING FALSE AFFIDAVIT IN.** The making and publishing an affidavit upon final proof for a pre-emption claim before a U. S. land office, which affidavit is genuine as to its execution, but false as to the matters therein stated, is not a crime within the purview of this statute.

Writ of Error to the Second Judicial District Court.

Hugh J. Campbell, U. S. Attorney, for plaintiff in error.

For citation of authorities in brief, see case *U. S. v. Spaulding*, ante.

Bartlett Tripp, for defendant in error, cited:

Rev. Stats. U. S., Secs. 5479, 5418; 3 Chit., C. L., 1022; 4 Bl., 245; 2 Russ., 318; 2 East. P. C., 852; Wharton C. L., Vol. 1, Sec. 653; 10 Cox, C. C. C., 118; Rev. Stats. (Mass.) Chap. 166, Sec. 1; Rev. Stats. (Wis.) Chap. 166, Sec. 1; *State v. Wilson*, 28 Minn., 52; *Regina v. White*, 2 Carr. & Kir., 404; *Heilbonis' case*, 1 Parker Crim. Rep., 429; *Com. v. Baldwin*, 11 Gray, 197; *Com. v. Foster*, 114 Mass., 311; *Man v. People*, 15 Hun., 155; *United States v. Wentworth*, 11 Fed. Rep., 52.

EDGEERTON, C. J.—The defendant was indicted in the Second District on June 2, 1881, for falsely making, transmitting and presenting a false affidavit to a United States officer with intent to defraud the United States, and for causing and procuring to be

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falsely made and for aiding and assisting in the falsely making of a certain affidavit for the purpose of defrauding the United States.

This indictment was sought evidently to be brought under section 5479 or section 5418 of the Revised Statutes of the United States, section 5479, which reads as follows:

“ If any person shall falsely make, alter, forge or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging or counterfeiting any bond, bid, proposal, guarantee, security, official bond, public record, affidavit or other public writing for the purpose of defrauding the United States, or shall utter or publish as true any such false, forged, altered or counterfeited bond, bid, proposal, guarantee, security, public record, affidavit or other writing for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited, or shall transmit to or present at the office of any officer of the United States any such false, forged, altered or counterfeited bond, bid, proposal, guarantee, security, official bond, public record, affidavit or other writing, knowing the same to be false, forged, altered or counterfeited, for the purpose of defrauding the United States, shall be punishable by a fine of not more than one thousand dollars, or by imprisonment at hard labor for not more than ten years, or by both such punishments.”

This is substantially the same as section 5418, the former section adding to the clauses the words, “ or cause or procure to be falsely made, etc., or willingly aid or assist in the false making, etc.” The indictment charges: “ That on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and eighty, at a place in said district and territory, and within the jurisdiction of this court, one John D. Cameron, late of said district and territory, in the matter of a certain application of one Patrick Fleming, then and there made in the name of said

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“ Patrick Fleming, as claimant before Benjamin F. Campbell, register of United States land office at the town of Sioux Falls, in said district and territory, wherein the said Patrick Fleming then and there claimed the right of pre-emption under the laws of the United States, to the following described public lands thereof, to-wit: The northeast quarter of section number fifteen, of township number one hundred and eleven, north of range number sixty-one, west of the fifth principal meridian, containing one hundred and sixty acres, then and there unlawfully did cause and procure to be falsely made, and then and there unlawfully did willingly aid in and assist in the false making of a certain affidavit and writing for the purpose of defrauding the United States.”

The indictment further charges that Patrick Fleming then and there made oath before the register of the United States land office, an affidavit for pre-emption which was false and untrue in all of its material allegations, as follows: “ And which said affidavit and writing was then and there designated and known as ‘Pre-emption Proof Testimony of Claimant,’ and on the back of which said affidavit and writing were then and there written and printed words and figures following, to-wit: ‘Pre-emption Proof Testimony of Claimant, Land Office at Sioux Falls, D. T., Cash No. 3184;’ and which said affidavit and writing was then and there subscribed and sworn to by one Patrick Fleming before one Benjamin F. Campbell, then and there being the register of the United States land office, at the town of Sioux Falls, in said district and territory, he, the said Benjamin F. Campbell, then and there having sufficient and competent power and authority as such register, to administer said oath to the said Patrick Fleming in that behalf, and to which said affidavit and writing was then and there appended by the said Benjamin F. Campbell, register as aforesaid, the official certificate and jurat of him, the said Benjamin F. Campbell as such register, in the

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" printed and written words and figures following, to-wit: 'I
" hereby certify that each question and answer in the foregoing
" testimony was read to the claimant before he signed his name
" thereto, and that the same was subscribed and sworn to before
" me this 24th day of June, 1880.

" [Signed.]

B. F. CAMPBELL,

" *Register.'*

" And which said certificate and jurat was then and there duly
" and lawfully subscribed and signed officially by the said Benja-
" min F. Campbell as register aforesaid; and which said falsely
" made affidavit and writing was then and there false and fraud-
" ulent in this: that in said falsely made affidavit and writing, he
" the said Patrick Fleming, then and there stated on oath in sub-
" stance and fact that he, the said Patrick Fleming, had made
" settlement on the following described public lands of the United
" States, to-wit: On the northeast quarter of section fifteen, of
" township number one hundred and eleven, north of range num-
" ber 61, west of the fifth principal meridian, containing one
" hundred and sixty acres, on the tenth day of June, in the year
" of our Lord one thousand eight hundred and seventy-nine, and
" that as his first act of settlement thereon he had built a shanty
" on said lands; whereas in truth and in fact, he, the said Patrick
" Fleming, had never at any time made any settlement whatever,
" or built any shanty on said above described lands; and which
" said falsely made affidavit and writing was then and there false
" and fraudulent in this: that in said affidavit and writing, he, the
" said Patrick Fleming, then and there stated on oath, in substance
" and fact, that subsequent to his said alleged first act of settle-
" ment, and before the said twenty-fourth day of June, in the year
" of our Lord one thousand eight hundred and eighty, he, the said
" Patrick Fleming, had made the following described improve-
" ments on said land—namely, that he had broken ten acres of
" said land and dug a well on said land and planted corn on said

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“ land, and built on said land a house ten feet by fourteen feet in
“ size, one story in height and having one door and two windows,
“ and that the value of said improvements was one hundred
“ dollars; whereas in truth and in fact, he, the said Patrick Flem-
“ ing, had never at any time broken any part of said land and had
“ never at any time dug any well on any part of said land, and had
“ never at any time planted any corn whatever on any part of said
“ land, and had never at any time built any house whatever on
“ said land and had never at any time made any improvements
“ whatsoever on said land; and which said falsely made affidavit
“ and writing was then and there false and fraudulent in this:
“ that in said affidavit and writing, he, the said Patrick Fleming,
“ then and there stated on oath and in substance and in fact that
“ the postoffice address of him, the said Patrick Fleming, was then
“ on the said twenty-fourth day of June, in the year of our Lord
“ one thousand eight hundred and eighty, at the town of Huron,
“ in the county of Beadle, in the Territory of Dakota; whereas in
“ truth and in fact the postoffice address of the said Patrick Flem-
“ ing was not then, on the twenty-fourth day of June, in the year
“ of our Lord one thousand eight hundred and eighty, at the town
“ of Huron, in the county of Beadle, in the Territory of Dakota,
“ and which said falsely made affidavit and writing was then and
“ there false and fraudulent in this: that in said affidavit and
“ writing, he, the said Patrick Fleming, then and there stated on
“ oath in substance and fact that he, the said Patrick Fleming,
“ had first established his residence upon said described lands on
“ the tenth day of June, in the year of our Lord one thousand
“ eight hundred and seventy-nine, and had resided upon said land
“ continuously all the time, ever since the tenth day of June until
“ the twenty-fourth day of June, in the year of our Lord one
“ thousand eight hundred and eighty, and had used the said land
“ as a farm and had broken and cultivated ten acres of said land
“ since his said alleged settlement; whereas in truth and in fact,

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“ he, the said Patrick Fleming, did not first establish his residence
“ upon said described lands on the said tenth day of June, in the year
“ of our Lord one thousand eight hundred and seventy-nine, and
“ had never at any time established any residence upon said land,
“ and had never at any time resided upon said land, and had never
“ at any time made any use whatever of said land, and had never
“ at any time broken and cultivated any part of said land, and had
“ never used said land as a farm; and which said falsely made
“ affidavit and writing was then and there false and fraudulent in
“ this: that he, the said John D. Cameron, unlawfully and for the
“ purpose of defrauding the United States, did cause and procure
“ the said Patrick Fleming to subscribe and swear as aforesaid to
“ the said false and fraudulent statements in said affidavit and
“ writing stated as aforesaid; and he, the said John D. Cameron,
“ then and there well knowing the said affidavit and writing to be
“ false as aforesaid; and he, the said John D. Cameron, then and
“ there well knowing the false and fraudulent statements aforesaid,
“ to be false and fraudulent as aforesaid; and he, the said John
“ D. Cameron, then and there well knowing said falsely made
“ affidavit and writing, then and there to contain said false and
“ fraudulent statements, contrary to the form of the statute in
“ such case made and provided, and against the peace and dignity
“ of the United States.”

The other count in the indictment charges the defendant as follows: “ And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That on the day and year aforesaid,
“ at the place aforesaid, in said district and territory, and within
“ the jurisdiction of this court, the said John D. Cameron unlawfully and for the purpose of defrauding the United States, did
“ transmit to and present at and unlawfully and for the purpose
“ of defrauding the United States, did then and there cause and
“ procure to be transmitted to and presented at the office of an
“ officer of the United States—that is to say, at the United States

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“ land office and office of Benjamin F. Campbell, register of said
 “ United States land office, at the town of Sioux Falls, in said dis-
 “ trict and territory, a certain false affidavit and writing, he, the
 “ said John D. Cameron, then and there well knowing said affi-
 “ davit and writing to be false.”

To this indictment the defendant upon arraignment plead not guilty, but afterward upon leave granted withdrew his plea of not guilty, and on January 10, 1882, demurred to the indictment as follows:

Demurrer:

“ The United States of America, }
 “ Territory of Dakota, } ss:
 “ Second Judicial District,

No. 3, April Term, 1881.

“ In the District Court in and for the Second Judicial District,
 “ Dakota Territory.

“ The United States }
 “ v. }
 “ John D. Cameron. }

“ And now comes the defendant upon leave first obtained of the
 “ Court, and demurs to the indictment herein upon the grounds:

“ *First*—Because it appears from inspection thereof that the
 “ court in which said indictment was found, was at the time exer-
 “ cising the jurisdiction of a Circuit and District Court of the
 “ United States, instead of the jurisdiction of a District Court.

“ *Second*—Because said indictment does not state facts sufficient
 “ to constitute a crime or offense against the laws of the United
 “ States.”

After argument the demurrer was sustained and the prosecution sued out a writ of error to this court.

The main question presented in this case is, whether section 5479 of the Revised Statutes of the United States, is a forgery statute or whether it provides for the punishment of those who

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make or assist in the making of affidavits which are genuine in themselves, but contain statements which are false and untrue, for the purpose of defrauding the United States.

If this statute is limited to forgery, then it cannot be claimed that this indictment is good. The statute provides that if any person shall *falsely make*, alter, etc., or "shall utter or publish as "true any *such* false, forged, etc."

The statute prohibits the false making, etc. The indictment charges that the defendant aided and assisted one Fleming in making a certain affidavit which contained matters which were false and untrue, with intent to defraud the United States, and with transmitting to an officer of the United States with intent to defraud the United States, an affidavit and writing which contained statements known to the defendant to be false and fraudulent.

Bouvier says, "Forgery is a false making *malo animo* of a "written instrument for the purpose of fraud and deceit."

Blackstone says, "It is the fraudulent making."

Every authority which I have been able to examine, makes forgery the false making or uttering or alteration of a written instrument purporting to be the act of some other person which it is not.

If the writing set forth in full in the indictment be the genuine act of Fleming as therein stated, however false may be the statements contained in the writing, can it be said that the affidavit was *falsely made*? And if not falsely made, is the offense charged within the purview of the section of the Revised Statutes quoted? The Supreme Court of Minnesota, in the case of *State v. Wilson*, reported in 9th N. W. Rep., 28, say that "Now, according to the "ordinary and proper meaning of the words 'false' or 'forged,' as "applied to a note or other instrument in writing, we always understand one that is counterfeit or not genuine, an instrument by "which some one has attempted to imitate another's personal act,

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“and by means of such imitation cheat and defraud, and not the doing of something in the name of another which does not profess to be the other's personal act, but that of the doer thereof who claims by the act itself to be authorized to obligate the individual for whom he assumes to act. This definition of the words ‘false’ and ‘forged’ is abundantly sustained by authority as the proper legal definition of these words.”

In the case of the *United States v. Wentworth*, reported in 11th Fed. Rep., 52, the defendants were indicted under this same section of the Revised Statutes, and upon a motion in arrest of judgment, the court, after setting out the words of the statute, says: “The indictments in this case seem to have been framed upon the idea that the false making, mentioned in the statute, was in the nature of perjury, because, after reciting the affidavits, they go on to allege in what particulars they are false.” But we are satisfied it is not the construction of the statute. A little analysis and attention to its language makes this quite apparent. It says: “If any person shall falsely make, utter, forge, or counterfeit.” Now the arrangement and connection of these words, putting the “false making” with other apt words to describe forgery, to-wit: altering, forging, counterfeiting, indicate its true intent and meaning—that it is aimed at forgery, and not at perjury. Again: If any person shall falsely make, alter, forge, or counterfeit any bond, bid, etc.

Now what is the false making of a bond or bid? Certainly not taking a false oath, because the execution of a bond or bid requires no oath. To falsely make an affidavit is one thing; to make a false affidavit is another. A person may falsely make an affidavit, every sentence of which may be true in fact; or he may actually make an affidavit, every sentence of which shall be false. It is the false making which the statute makes an offense, and this is forgery as described in all the elementary books.

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The indictment does not charge that the affidavit was transmitted to or presented at any office or officer of the government of the United States *in support of or in relation to any account or claim*. There may possibly be a fair intendment of that, but no specific charge. If this had been the purpose of the pleader, the indictment in that particular is too indefinite to charge the defendant with the offense provided for in the last clause of section 5421 of the Revised Statutes.

The judgment of the District Court is

AFFIRMED.

All the Justices concurring.

TALBOT V. PETTIGREW.

1. CONTRACT: CORRESPONDENCE: PURCHASE AND SALE. On July 5th P. wrote to T.: "What is Cole's scrip worth, and soldiers' additional homesteads, 'now?'" On July 8th T. replied, "Have to advise that I can furnish to-day Cole's scrip at \$5, and additional 80's at \$3 per acre." On July 12th P. telegraphed: "Send me 2 soldiers' additional eighties to-day." Held, not a contract for a sale at \$3 per acre.

Appeal from the District Court of Minnehaha County.

The facts are stated in the opinion.

L. S. Swezey, for appellant. Points and authorities cited:

It is the settled law in England and in this country, that when a proposal is made by letter, the deposit of a letter of acceptance in the postoffice by the person to whom the proposal is made, or the sending a telegram announcing acceptance, completes the contract: *Adams v. Lindsell*, 1 B. & Ald., 681; *Duncan v. Topham*, 8 C. & B., 225; *Dunlap v. Higgins*, 1 H. & L. Cases, 381; *Tay-*

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lor v. Ins Co., 9 How., (U. S.) 390; *Mactier v. Frith*, 6 Wend., 103; s. c. 21 Am. Dec., 262; *Vassar v. Camp*, 11 N. Y., 441; *Trevor v. Wood*, 36 N. Y., 307; *Batterman v. Morford*, 76 N. Y., 622; *Washburn v. Fletcher*, 42 Wis., 152; *Wheat v. Cross*, 31 Md., 99; 1 Parsons on Contracts, 480, Sec. 2, Title, "Assent."

A proposal made by letter is to be regarded as a continuing offer for a reasonable time, in which the purchaser may manifest his intention to accept, unless the time for acceptance is otherwise expressly limited. And what is such reasonable time must depend upon the circumstances of each case. See cases before cited. 1 Parsons on Contracts, 480, and notes; *R. R. Co. v. Bartlett*, 3 Cush., 224; *Beckwith v. Cheever*, 1 Foster, 41; *Cheney v. Cook*, 7 Wis., 413.

After such acceptance neither party, by any subsequent action or notice, can affect the rights of the other party. See foregoing cases; also, *Schuchardt v. Allens*, 1 Wall., 359; *Uitley v. Donaldson*, 4 Otto, 29. Where there is an express contract the law will not imply a different contract: *Waite v. Merrill*, 4 Greenleaf, 102; s. c. 16 Am. Dec., 238; *Ross v. Hardin*, 79 N. Y., 84; *Walker v. Brown*, 28 Ill., 378.

F. L. Boyce, for respondent. Points and authorities cited:

Pettigrew's letter of the 5th was not a proposal to purchase, but was merely an inquiry as to the then market value of scrip.

Was Talbot's letter of the 8th an offer to sell? No. It was only responsive to Pettigrew's inquiry, which was, "What are 'soldiers' additional homesteads worth;" not "What will you sell them to me for?" But if Talbot's letter of the 8th be treated as an offer to sell, it was by its express terms limited to that day. It was, "Have to advise that I can furnish * * * to-day at \$3.00 per acre."

We contend there was no contract between the parties until de-

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fendant accepted and received the scrip; and that when he accepted and received it, he did so at the price specified in plaintiff's letter accompanying the scrip, which was \$3.25, the acknowledged market price of the scrip on the day it was sent. Clearly Mr. Talbot did not intend, in his letter of the 8th, to bind himself to sell *at any future day*, at the price of \$3.00 per acre. A case more nearly in point than any other we have seen is, *Knight v. Cooley*, 34 Iowa, 218.

KIDDER, J.—This case was submitted to the court below without the intervention of a jury. The question presented for our determination is whether the facts found are sufficient to support the judgment, which was for the plaintiff. The court below found the facts as follows:

(1.) That during the month of July, 1879, the plaintiff resided at Sioux City, Iowa, and was engaged in business as dealer in land scrip and soldiers' additional homesteads, and that the defendant, during that time, resided at Sioux Falls, Dakota.

(2.) That the defendant had at various times during several years purchased of plaintiff land scrip and soldiers' additional homesteads.

(3.) That on July 5, 1879, the defendant wrote to the plaintiff at Sioux City, a letter, to which he added this postscript: "What is Cole's scrip worth, and soldiers' additional homesteads, now?"

(4.) That on July 8, 1879, plaintiff wrote to the defendant, in answer, as follows: "Have to advise that I can furnish to-day Cole's scrip at five dollars and additional eighties at three dollars per acre. Shall be pleased to hear from you at any time you may desire the paper."

(5.) That this letter was received by defendant at Sioux Falls on the evening of July 11, 1879, and on the morning of the next

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day he sent the plaintiff a telegram, as follows: "Send me two 'soldiers' additional eighties (80's) to-day."

(6.) That the telegram was received by plaintiff the day it was sent, and on the same day he sent by express to defendant at Sioux Falls, four 80-acre pieces of soldiers' additional, and inclosed in the express package his letter as follows: "Per the request of your 'telegram of this date, stating, 'Send two eighties additional to-day.' I send you the following described soldiers' additional 'homestead scrip, collection on you, at \$3 per acre for the two 'heir claims, and \$3.25 for the others. I send you these so that 'you may take your choice of them. In heirs' claims, can furnish 'deed from guardian of children. Please remit immediately, for 'the pieces that you desire, at the prices stated, and return the 'balance of them, as I have large demands and can use elsewhere."

" Minor orphan children of Leonard L. Jenks, No. 693, La Crosse, Wis., 80 acres at \$3.00, - - - - -	\$ 240
" Minor orphan children of E. M. Stacey, No. 406, Min- neapolis, Minn., 80 acres at \$3.00, - - - - -	240
" John W. Towne, No. 492, Council Bluffs, Iowa, 80 acres at \$3.25, - - - - -	260
" Barton Ramsey, No. 4228, Ionia, Michigan, 80 acres at \$3.25, - - - - -	260

" Making a total cost of - - - - - \$1,000

" Please give this prompt attention and make immediate re-
mittance for the paper you desire and return balance."

(7.) That said package was received by defendant at Sioux Falls, on July 13, 1879, and defendant retained and used the two pieces described as John W. Towne, No. 492, Council Bluffs, Iowa, 80 acres; and Barton Ramsey, No. 4228, Ionia, Michigan, 80 acres; and on July 19, 1879, returned the other two pieces, together with \$480, to pay for the two pieces retained.

(8.) That plaintiff has demanded of defendant \$40 balance claimed by him for the scrip retained, which has not been paid.

(9.) That on July 12, 1879, the market price at Sioux City for

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the two pieces retained was \$3.25 per acre, and that the other two returned were not standard in the market and were of less value.

It seems to us that there was no contract between the parties until the plaintiff, in response to the defendant's telegram of July 12, stating, "Send me two soldiers' additional eighties (80's) to-day," sent him the two additional, and they were received by the defendant. There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting. The facts as found do not suggest any agreement of the parties before the telegram was sent. The defendant, on the fifth day of July, asked the plaintiff by letter: "What is Cole's scrip worth and soldiers' additional homesteads, *now?*" On the eighth of July the plaintiff replied as follows: "Have to advise that I can furnish *to-day* Cole's scrip at \$5 and "additional eighties at \$3 per acre." This last letter was received by the defendant on the eleventh of July, and the next day he telegraphed for it; and on the same day they were sent to him at the price of \$3.25, the then market price in Sioux City.

It is plain, then, that the correspondence of the parties in relation thereto, prior to the sending the telegram, was merely in relation to the price of the scrip, advisory as to its value on a *particular day*, and *solicitous* to obtain the patronage of the defendant. There is nothing therein indicating the *aggregatio mentium* absolutely necessary to constitute a contract. The defendant inquired only as to the price on a day stated. He did not say nor intimate that he wanted to purchase, and the plaintiff replied to him, giving him the price on such a day, and that he would be pleased to hear from him "any time you *may desire* the paper," which clearly indicates that the plaintiff did not consider that he had made—closed—a contract; or why should he have used the words, when "*you may desire the paper.*" He did not even offer to sell. He advised him *that it is worth to-day*. The plaintiff sent the scrip "per the request of" the defendant's "telegram of

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"this date." There was no contract between the parties until the scrip was received by the defendant, and when he accepted it he did so at the price specified in the letter in which it was inclosed, viz., \$3.25 per acre. There is no connection between the letter of the 8th and the telegram. The latter in no manner refers to the former.

The learned counsel of the defendant, on the argument, relied largely upon *Utley v. Donaldson*, 94 U. S., 29, and claimed that in many of its features it is like this case; but we fail to see the similitude. That case can be stated thus: The plaintiffs were brokers and stock dealers in New York, and the defendants in St. Louis, and they were business correspondents of each other. On May 24, 1871, the defendants telegraphed the plaintiffs as follows: "Make best bid, 15 Central Pacific, quick. DONALDSON & FRALEY." On the next day these defendants received a dispatch from the plaintiffs as follows: "We will buy Central Pacific at a hundred and two and a half, (102½.) UTLEY, DOUGHEERTY & SCOTT." And on the day of its receipt the defendants sent another telegram to the plaintiffs as follows: "We accept your offer, 15 Central, 102½. DONALDSON & FRALEY."

In this case a bid was solicited, naming the amount. An answer, "We will buy," etc. And a reply, "We accept your offer," etc. This was a contract—the minds of the parties met; but in what particular it is parallel to the case at bar is what I have not yet discovered. There were other points in the case, but so entirely unlike the one under consideration I do not take time to refer to them.

Reference was made in argument, by counsel for defendant, to several authorities which in substance held the familiar doctrine, "That when a proposal is made by letter, the deposit of a letter of acceptance in the post by the person to whom the proposal is made, or the sending of a telegram announcing acceptance, com-

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* pletes the contract." But such is not the case we are now considering. So far as I have examined the authorities upon the question in issue, there is no conflict; and, without multiplying, I desire to cite *Knight v. Cooley*, 34 Iowa, 218, as one nearer in point than any other to which our attention has been called. In this case the plaintiff wrote to the defendant and asked "whether he (defendant) was the owner of the south two-fifths of lot 469, and, if so, *what was the price of same.*" The defendant answered:

"*Friend Knight*—Yours is received. The lots are so incumbered it would be difficult to make title at once. Price, \$1,700 and \$1,500 net, and cheap. Truly, D. N. COOLEY."

May 22d the plaintiff replied:

"Yours of the 18th is at hand. I will take the lots on the terms proposed by you in it, and herewith send you draft for \$100, on account of the bargain. The balance of the money is ready, and will be paid immediately on good, clear title being made. I wish you would proceed to have the title made at your earliest convenience. Yours, M. J. KNIGHT."

One of the parties was in Washington city, the other at Dubuque, Iowa. The plaintiff sued the defendant for a breach of the contract, and relied upon the above correspondence. The District Court gave judgment for the plaintiff, but the Supreme Court reversed it, holding that there was no contract, and says: "The instruction given by the Court to the jury, to the effect that the correspondence, taking either the statement of plaintiff or defendant as to the contents of the plaintiff's first letter, constituted a contract, is erroneous. Defendant's evidence is to the effect that the letter simply inquired if he was the owner of the property, and the price thereof. It made no proposition to purchase, named no purchaser, and, in fact, contained nothing which could have been so understood. The answer to this letter simply states a price which defendant regards as cheap, and the fact that it would be difficult to make title at once. We do not

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“ understand the letter to contain a proposition to sell the lots.
 “ The mere statement of the price at which property is held, can-
 “ not be understood as an offer to sell. The seller may desire to
 “ choose the purchaser, and may not desire to part with his prop-
 “ erty to any one who offers his price. We regard the corres-
 “ pondence, taking it as given in defendant’s testimony, so far as
 “ it goes, as amounting, on defendant’s part, simply to a negotia-
 “ tion, and not to a binding offer. It required the acceptance by
 “ him of the offer contained in plaintiff’s last letter, to create a
 “ binding contract.”

So, in the case before us, as we have already observed, prior to the telegram there had been no proposition to buy, nor an offer to sell, but merely an inquiry as to the value on a particular day, and a statement as to its value on such day.

Further discussion seems to be useless. It is clear that the judgment of the court below was right, and it is therefore

AFFIRMED.

All the Justices concurring.

NICHOLS, SHEPARD & Co. v. BARNES ET AL.

1. **MORTGAGED PROPERTY: DESCRIPTION OF: CAPABLE OF IDENTIFICATION: NOT UNCERTAIN.** In a mortgage executed upon property in the possession of the mortgagor, a part being described as “an undivided two-thirds interest, “same being entire interest of said Wm. H. Wheeler in and to sixty acres “of wheat now in and growing on the northeast $\frac{1}{4}$ of section 32, in town- “ship 141, north of 5th P. M.” Held, not uncertain and indefinite; that the property could be identified by inquiry.
2. **SAME: RECORD CONSTRUCTIVE NOTICE: PURCHASER LIABLE FOR CONVERSION.** The wheat having been sold by the mortgagor to the defendants, who mixed it with other wheat and sold it in the ordinary course of business; the

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mortgage being on file in the proper office was constructive notice to defendants of plaintiffs' interest, and defendants were liable for conversion.

Appeal from the District Court of Cass County.

The facts are stated in the opinion.

Twomey & Francis, for defendants and appellants. Points and authorities in brief:

We hold that such a description of property as that contained in this mortgage, is void as to third persons for its indefiniteness and uncertainty, and that the property so attempted to be conveyed is absolutely incapable of being definitely ascertained: Civil Code, Sec. 1722; Jones' Chattel Mortgages, Sec. 55 *Fowler v. Hunt*, 43 Wis., 345; *Muir v. Blake*, 11 N.W. Rep., 621, reversing 9 N.W. Rep., 274; *Yant v. Harvey*, 7 N. W. Rep., 675; *Pennington v. Jones*, 10 id., 274; 67 N. C., 40; 12 Am. Rep., 600; *Hahn v. Fredericks*, 30 Mich., 223; *Richardson v. Alpena Lumber Co.*, 40 Mich., 208. An indefinite description in mass, may be made definite—*first*, by a separation; *second*, by delivery; *third*, by possession passing to the mortgagee: *Morrow v. Reed*, 30 Wis., 81; *Weld v. Cutler*, 2 Gray, 195; *Crofoot v. Bennett*, 2 N. Y., 258; *Call v. Gray*, 37 N. H., 428; *Young v. Young*, 6 Peck, 280. The mortgagee could not enter and take away the interest as against the joint owner: *Garr v. Hurd*, 92 Ill., 315. A mortgage cannot continue a floating lien: *Golder v. Ogden*, 15 Pa. St., 528; and until a separation, no title could vest in any particular lot: *First Nat. Bank v. Crowley*, 24 Mich., 224; *Kelly v. Reid*, 57 Miss., 89; *Draper v. Perkins*, id., 277; *Williamson v. Steele*, 3 Lea. (Ten.) 527; *Potts v. Newell*, 22 Minn., 561; *Mer. Nat. Bank v. McLaughlin*, 2 Fed. Rep., 131; 50 Ill., 444; 55 Ga., 543. Would such a description in a bill of sale have passed any title? *Holmes v. Hall*, 8 Mich., 65; *Barnard v. Eaton*, 2

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Cush., 295; *Hutchinson v. Hunter*, 7 Pa. St., 145; *Golder v. Ogden*, 15 id., 528; *Keeler v. Goodwin*, 111 Mass., 490; *Scudder v. Worcester*, 11 Cush., 573; *Waldo v. Belcher*, 11 Ired., 609. Where part is sold out of a lot, and the whole is destroyed before separation, the loss falls on the vendor: *Bailey v. Smith*, 42 N. H., 141; 30 Mich., 224; 24 Mich., 492; 22 Minn., 561; 2 N.Y., 258; Wells' Replevin, p. 103; 6 Pick., 280; Herman Chat. Mort., p. 76; *Duke v. Strickland*, 43 Ind., 494. Allowing the mortgagor to remain in possession after harvest, and hold himself out as the owner of the wheat, shows an implied power of sale which the mortgagee should not be allowed to deny as against a subsequent purchaser in good faith: *Thompson v. Blanchard*, 4 N.Y., 303; *Pratt v. Maynard*, 116 Mass., 388; *Nat. Bank v. Hampson*, 52 B. Div., 177; *Barnett v. Fergus*, 51 Ill., 352; 29 id., 122; 29 N. H., 557; 21 Wis., 417. Parol evidence cannot be introduced to identify the property in this case, as identification is impossible.

H. F. Miller, for plaintiff and respondent. Points and authorities cited:

Wheeler mortgaged all the interest he had in the crop of wheat in question, being an undivided two-thirds interest in the sixty acres of wheat in his possession on land particularly and fully described. Can any person owning an undivided interest in growing crops, make a mortgage thereof, valid as between himself and his mortgagee, and, by filing the same, give constructive notice of the mortgagee's lien, to a third person? Every man may transfer his own property, either absolutely, by bill of sale, or conditionally, by mortgage: Bump on Fraudulent Conveyance, p. 62.

If Wheeler was a tenant in common with some third party, as assumed by appellants, still his interest was subject to levy on execution: Freeman on Ex., Sec. 125.

An assignment by Wheeler of his interest in the growing crop,

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as described in the mortgage, would have passed his interest to the assignee: *Carter v. Jarvis*, 9 Johns., 143; *Gibson v. Stevens*, 8 How., (U. S.) 384; *Pratt v. Parkman*, 24 Pick., 42; *Morgan v. Smith*, 29 Ala., 288.

Any person, whether tenant in common, joint tenant or partner, may mortgage his individual interest: *Shuart v. Taylor*, 7 How. Pr., 251. The mortgagee becomes a tenant in common, in place of the mortgagor: *Smith v. Rice*, 56 Ala., 417; *Garr v. Hurd*, 92 Ill., 318. Either a landlord or tenant may mortgage his individual interest, valid if filed, to the extent of that interest, as against third persons: *Potts v. Newell*, 22 Minn., 563. By filing, the mortgage became notice of the lien thereon to all subsequent purchasers and incumbrancers: Civil Code, Sec. 463.

Appellants had no right to buy any wheat raised on that quarter section, without inquiry: Jones on Chattel Mortgages; 54-59-61; *Winter v. Landphere*, 42 Iowa, 741; *Lawrence v. Evarts*, 7 Ohio St., 194; *Pettis v. Kellogg*, 7 Cush., 456.

Wheat threshed, removed and sold in the market, may be identified as the same covered by a mortgage of ten acres of growing wheat: *Duke v. Strickland*, 43 Ind., 494; Jones' Chattel Mortgage, 60, *et seq*; *Smith v. Jenks*, 1 Denio, 580; *Butler v. Hill*, 1 Bax., (Tenn.) 375; *Coles v. Clark*, 8 Cush., 399.

The question whether findings of fact are justified by the evidence cannot be raised on a bill of exceptions: *St. Croix Lumber Co. v. Pennington* 2, Dak., 467.

Hudson J.—This action is brought by the plaintiff, a private corporation, to recover of the defendants for the conversion of a quantity of wheat. The plaintiff claims title to the property by virtue of a chattel mortgage, executed to it by one Wheeler, who, while the mortgage was in full force, surreptitiously, as is alleged,

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sold and delivered the wheat to defendants, which was put into their warehouse, mixed with other wheat and sold in the ordinary course of business, they not having any actual knowledge of the claim of the plaintiff to the wheat. A demand of the same was made upon the defendants, which was refused.

There seems to be but one question raised in this contention—namely, whether the description of the property in the mortgage was not too uncertain and indefinite, in that it did not point out the subject matter of it so that a third person, by its aid, together with such inquiry as the instrument itself suggested, could identify the property. The description in the mortgage is as follows:

“An undivided two-thirds interest, the same being the entire interest of said Wm. H. Wheeler, in and to sixty acres of wheat now in and growing on the northeast $\frac{1}{4}$ of section 32, in township 141, north of range 51 west of the 5th P. M.”

The mortgage also covered other property, is in the usual form, and was filed with the register of deeds, as provided by law. By section 1745 of the Civil Code, the filing of a mortgage of personal property in conformity to law, operates as notice thereof to all subsequent purchasers, etc. It is very clear that the defendants purchased this property with this constructive notice, unless the description contained in the mortgage was too indefinite to enable them to identify it by inquiry and by the terms therein employed. By this description it appears that this crop of wheat was growing on land so particularly described that had it been a deed of the land it certainly could be identified. It was as definite as descriptions of real estate are usually made. Then if the land could be identified, could any particular sixty acres of wheat in the possession of W. H. Wheeler, growing upon this quarter section and in which he had an interest, be identified by inquiry? We can hardly see how a description of this property could be more definite. Had this been an absolute sale, it need not have been more so, to pass the title. Had the property been levied upon by exe-

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cution, the return of the officer and his advertisement of sale by such description must have been held sufficient. In *Potts v. Newell*, 22d Minn., 563, property was described in a chattel mortgage as "All the right, title and interest of the said Lewis Gauthier, in and to that certain crop of wheat, raised upon the land of the said Gauthier, situated in the town of Egan, county of Dakota and State of Minnesota, by one Robert O'Neil, during the year of 1875." It appeared that the crop had been cut and was in stack at the time the mortgage was executed, and that the interest of the mortgagor was one-third, which had been set apart. This one-third interest having been seized by virtue of an execution against the goods of the mortgagor, it was held that the title passed to the mortgagee under the mortgage, and the levy under the execution could not be sustained. We cannot see that the description of the property in that case was any more definite than the one at bar.

The learned counsel lays stress upon the fact that in the case of *Potts v. Newell*, the interest of the mortgagor was set apart. This circumstance was important in that case, for the reason that the mortgage did not state what was the extent of the interest. The setting apart defined it as one-third, and on setting apart the title vested. But in the case at bar the mortgage does state the interest to be two-thirds and the entire interest of the mortgagor. It is said in one case that a description like this, "My entire crop of cotton and corn of present year," is sufficiently definite. Had it been two-thirds of my entire crop, etc., would it not have been equally definite? We think it would. It being a fractional part, the amount of the whole being given, cannot render it too uncertain.

It is impossible to describe personal property so well as to preclude the necessity of parol evidence to identify it. Thus, in case of a mortgage of a pile of wood upon a certain lot of land, upon

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which there are also other piles of wood, resort may be had to extrinsic evidence to determine which pile was intended: *Sargeant v. Solberg*, 22 Wis., 132. Parol evidence in these and like cases serves to apply the description to the subject matter intended to be embraced in it, and is admissible for that purpose: *Dodge v. Potter*, 18 Barb., (N. Y.) 193.

It is said that the defendants in this case could not tell when the wheat was offered for sale, whether the same was covered by mortgage or not. That is very true; nor could they tell whether the persons offering it had any title to it or not. From anything that there appeared, it might have been stolen property; and in the latter case the real owner, on proof of its conversion, could recover for his property so converted. This risk is taken by all persons purchasing such property of a stranger; and is it a greater hardship when the legal title is held under a chattel mortgage? The law has afforded some protection in the latter case by providing for the filing of the instrument, or a copy, where all persons may have an opportunity to inspect it, whereas in the former no such protection is afforded. The mortgagor's possession of the property is *prima facie* evidence of ownership. So is that of a thief. Such hazards cannot well be avoided.

It is claimed that such a risk as is taken under the chattel mortgage law is against public policy as being in restraint of trade. This is but one side of the question. Upon the other side it may be said that business transactions would be greatly embarrassed and retarded if personal property could not be encumbered in the hands of the owner, to aid the man of limited means. It is that by which many a poor man has become prosperous, and the man of money secured his just dues, and both mutually benefitted.

In this case the defendants have suffered from the dishonesty

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of a rogue. All business men are liable to suffer from dishonest men, and not oftener in transactions of this kind than others.

The judgment of the District Court is

AFFIRMED.

All the Judges concurring.

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1. **MARITIME LIEN: BUILDING CONTRACT.** It is the settled law of admiralty in this country that under a building contract, no maritime lien can be maintained against a vessel for material furnished or labor expended in her construction.
2. **LAUNCHING HULL: SUBSEQUENT CONSTRUCTION.** The mere launching of the hull of an incompleated steamboat cannot give to a new builder, thereafter engaged in her construction, the lien of the maritime law.
3. **HOME PORT: WHAT IS.** So far as the question of home port affects the rights and remedies of material-men, that port of the state or territory where the owner, or if more than one, where the managing owner resides, is to be deemed the home port of the vessel.
4. **PORT ON MISSOURI RIVER: WHAT IS.** A port upon the Missouri river is any place where steamboats may land with safety and lie moored to the shore, and not merely those places designated by acts of Congress as ports of entry, and for other purposes.
5. **HOME PORT: SUPPLIES FURNISHED AT: NO LIEN FOR.** A material-man has no maritime lien for supplies furnished a domestic vessel in her home port.
6. **SAME: TERRITORY: STATE.** The rules of maritime lien as affected by the question of home port, apply to a vessel whose managing owner resides at a port in the territory, the same as in a state.
7. **SAME: REPAIRS.** Any port within the Territory of Dakota, was a home port of this steamboat, "General Terry;" and no maritime lien attached to such vessel for material used for repairs, and furnished upon the order of the managing owner, at a port within this territory.

Appeal from the Second Judicial District Court. In Admiralty.

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The facts are stated in the opinion.

Bartlett Tripp, for libellants and appellants. Points and authorities cited:

Very respectable authorities lay down the doctrine that a contract for the building or construction of a vessel is a maritime contract: Benedict's Admiralty, Sec., 264; 1 Conkling's Admiralty, 104-5, (2d Ed.) The Supreme Court of the United States has, however, settled the doctrine that a building contract confers no maritime lien: *The People's Ferry Co. v. Beers et al*, 20 How., 393; *Roach et al v. Champman et al*, 22 How., 129; *Edwards v. Elliott*, 21 Wall., 532.

This case does not come within the reasoning of, or the doctrine laid down by the U. S. Supreme Court. Ours was a contract made on land, to be performed on water: 6 Ben. Ad. Rep., 115; *Endner v. Greco*, 3 Fed. Rep., 411; 2 Kent's Com., 361-2; *Coursin Appeal*, 79 Pa. St., 220; *Hardy v. The Ruggles*, 2 Hugh., 78; *Grace Mead*, 2 Hugh., 83; *Calkins v. United States*, 3 Court of Claims Rep., —; *Eliza Ladd*, 3 Sawyer, 519.

It is only incumbent upon libellants to show a necessity, or apparent necessity for the repairs or materials. The law, in absence of testimony to the contrary, presumes the necessity for a lien upon the vessel: *Crawford v. Roberts*, 50 Cal., 241; *Provost v. Patchin*, 9 N. Y., 239; *The Grape Shot*, 9 Wallace, 136; *The Lulu*, 10 Wallace, 201; *The Kalorama*, 10 Wallace, 215; *The Custer*, 10 Wallace, 217; *The St. Joseph*, 1 Brown Admr., 202; *Pratt v. Reed*, 21 Wall., 588; *Ins. Co. v. Baring*, 20 Wall., 163; *The James Guy*, 1 Ben. Ad., 114-115; case affirmed in 9 Wall., 758; *Mary Bell*, 1 Sawyer, 135.

The master whose name appears on the register or enrollment as master, is master for every legal intendment and purpose until

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another is duly appointed and registered: *Dubuque*, 2 Abbott U. S. Rep., 20.

The pivotal point of this case is the determination of the question, "What was the home port of the General Terry at the time these debts were contracted?" Revised Stats., (U. S.) Sec. 2767; 1 Chitty Com. Law, 726; 1 Blackstone Com., 264; Revised Stats., (U. S.) Titles 48 and 50, and Secs. 4141 and 4312.

The port to which we look for the record of the vessel, her name, her master, her build, her owners, as well as the changes made in name, master, construction or owners, is essentially *her home port*—it is her *situs*; *Martha Washington*, 1 Clifford, 463; *Hays v. Pacific Mail Steamship Co.*, 17 How., 598; *Morgan v. Parkam*, 16 Wall., 471; *White's Bank v. Smith*, 7 Wall., 646; Rev. Stats., (U. S.) Secs. 2568, 4344; *The Loper*, Taney Decisions, 500; *The Lottawana*, 21 Wall., 558; *The Favorite*, 3 Sawyer, 411; *The Yeager*, 1 Fed. Rep., 285; *The General Smith*, 4 Wheaton, 438; *Benedict Admiralty*, Sec. 273; *Waring v. Clark*, 5 How., 475; 1 Bell's Com., 527; *The Gen. Burnside*, 3 Fed. Rep., 228; *The De Wolf*, 3 Fed. Rep., 236; *Fate Tremaine*, 5 Ben., 68; *The Albany*, 4 Dillon, 439.

N. J. Cramer, for claimants and respondents. Points and authorities cited:

A contract to build a vessel, or furnish machinery, or perform labor in its construction, is not a maritime contract: *The Gen. Smith*, 4 Wheaton, 438; *People's Ferry Co. v. Beers*, 29 How., 293; *St. Jargo de Cubia*, 9 Wheat., 409; *Roach et al v. Champman et al*, 22 How., 129; *The Belfast*, 7 Wall., 624; *Marwood v. Enquest*, 23 How., 491; *Collins v. Steamboat Fort Wayne*, 1 Bond, 476; *Foster v. Ellis*, 5 Benedict, 83; *Edwards v. Elliott*, 21 Wall., 532; *Smith v. The Royal George*, 1 Wood., 290; *The Sam. Kirkman*, 1 Bond, 369.

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Material-men furnishing repairs, or supplies to a vessel in a foreign port, do not acquire a lien upon the vessel when the master has funds, or the owners have sufficient credit, and the material-men know these facts, or such facts and circumstances as were sufficient to put them on inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain relief on the credit of the vessel: *The Grape Shot*, 9 Wall., 129; *The Guy*, 9 id., 158; *The Lulu*, 10 id., 192; *The Kalorama and Custer*, id., 204; *Goodman v. Simonds*, 20 How., 343; *Thomas v. Osborn*, 19 id., 22; *Pratt v. Reed*, 19 id., 359; *Collins v. Steamboat Fort Wayne*, 1 Bond, 476.

A contract to make repairs and furnish supplies in the home port of the vessel is not a maritime contract, and material-men do not thereby acquire a lien upon the vessel: *The Orleans v. Phœbus*, 11 Peters, 175; *The Plymouth Rock*, 13 Blatch., 505 and 508; 2 Parsons on Shipping, 312; *The Edith*, 11 Blatch., 451-94, and authorities hereinbefore cited.

The character of a vessel, as foreign or domestic, is not determined by the place of enrollment, but by the residence of its owners: *Burke v. The Brigg Richmond*, 1 Clifford, 308; *The Golden Gate*, 5 Am. Law Reg., (O. S.) 142, and 1 Newburg, 308; *The Superior*, 3 id., 622; 1 id., 178; *The Mary Bell*, 1 Sawyer, 135; *The Kosiuskoo*, 11 N. Y. Leg. Obs., 38; *The Brigg Hester*, 1 Sumner, 73; *Foster v. Ellis*, 5 Benedict, 83; *The Gen. Smith*, 4 Wheaton, 438; 1 Parsons on Shipping and Ad., 43, and authorities hereinbefore cited.

MOODY, J.—In July, 1879, James Rees filed his libel in the District Court for the Second District, claiming a maritime lien upon the steamboat General Terry, for work and labor done and materials furnished in the alleged construction and repair of said steamboat, at Pittsburgh, Pa., in the winter and spring of 1878.

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On the same day Blatt & Buerdorf filed their libel in said court claiming a lien for groceries and supplies furnished the Terry, at Yankton, Dakota Territory, in the spring of 1879.

The two libels were consolidated and tried together in the District Court—the testimony being separately preserved—and after the hearing that court dismissed both libels, upon the ground that neither libellant had a maritime lien upon the said steamboat, and the libellants appeal to this court.

Two questions only are raised and argued here. One is applicable to the libel of James Rees, and involved the inquiry, What constitutes a building contract? The other relates to the libel of Blatt & Buerdorf, who furnished supplies to the Terry at what the claimants contend was the home port of the vessel.

A small item included in the libel of James Rees, is also for supplies furnished by him for the Terry, at Bismarck, Dakota Territory, the question regarding which is the same as that presented in the case of Blatt & Buerdorf. The facts found by the District Court, relating to the libel of James Rees, and which are affirmed by the court, so far as they form a basis for our determination are, in substance, these:

In the winter of 1878, Walter A. Burleigh, one of the claimants, and other persons, conceived the purpose of building, at Pittsburgh, Pa., for navigation upon the upper Missouri river and its navigable tributaries, a steamboat, to be called when built, the "General Terry."

In carrying out such purpose they contracted with one person, or firm, to build the hull; with another to construct the machinery with which the steamboat was to be propelled, and with others for the cabin and upper works. James Rees, the libellant, was the contractor for the machinery. The hull was constructed at a point about twenty miles below Pittsburgh, and after being launched was towed to Pittsburgh, where the machinery was put in by Rees,

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and the steamboat completed. Mr. Rees was thoroughly familiar with all the details of the transaction, and the purpose of the parties from the outset, his son being one of the owners, and himself superintending the construction of the boat, and taking a lively interest in its success. In March, 1878, after being duly, temporarily, enrolled at Pittsburgh, as by law required, the Terry was taken to Yankton, Dakota Territory, and thereafter used in the navigation of the Upper Missouri and Yellowstone rivers.

As will hereinafter be more particularly noticed, the port of Pittsburgh, Pa., was after the completion of the General Terry, a port foreign to her, so that with reference to the libel of James Rees for the machinery furnished in her construction at Pittsburgh, the question of *home port* does not arise.

It may be considered as the settled law of admiralty in this country, since the decision of the Supreme Court of the United States in *Peoples' Ferry Company v. Beers*, 20 How., 393, that under a building contract no maritime lien can be maintained. But the contention here is, that inasmuch as the hull of the steamboat was built at another place, there launched, and thence towed to Pittsburgh for completion, the libel of Rees can be sustained, upon the theory that the labor he performed, and materials he furnished, were in the nature of repairs, for which a lien is given.

At the time the hull was launched it was neither a steamboat, a barge, a lighter, a scow, nor a vessel of any description for navigation, either by its own means of propulsion, or by means of any other power. It was merely the hull of a steamboat in process of construction, toward which construction the libellant contributed, by furnishing the engines, boilers and machinery. Neither was it the case of a vessel once constructed, thereafter wrecked, or partially burned, and reconstructed and repaired. Nor was it machinery of a former vessel used upon a new hull. The steamboat as an entirety was constructed partially by the libellant, and in part by others.

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It would seem that the case of *Roach & Long v. Chapman et al*, 22 How., (U. S.) 129, was decisive of this appeal. In that case the libellants had furnished at Louisville, Ky., the engines, boilers, and machinery for the steamboat Capitol, in her construction. The court say: "A contract for building a ship or supplying engines, timber or other material for her construction, is clearly not a maritime contract." "Any former dicta or decisions which seemed to favor a contrary doctrine were overruled by this court in the case of the *Peoples' Ferry Co. v. Beers*," 20 How., 393.

It does not directly appear, from the facts reported in that case, whether the boilers and machinery were furnished and put into the steamboat before, or after, the hull was launched. In the nature of the transaction it must have been afterwards. It is a matter of common observation that machinery of this character is not put upon a steamboat, until after the hull is launched. And if once upon the water it can make no difference, in principle, whether the hull lies moored where it left the ways, or was towed one rod, or twenty miles, for the purpose of receiving the machinery and the completion of the vessel.

The dividing line between the existence and non-existence of the maritime lien is, where construction ends and repairs commence, and the fact of the boat, or its completed parts, being upon the water, is only an incident to be taken into account, in determining whether the labor and materials were in the repair of the vessel, or in its construction.

A rule which would deny the right of maritime lien to the man who furnishes the materials for, and performs the labor upon a steamboat in her construction, while the hull is still upon the ways, and allows such lien to the person who puts on the additional planks to complete the hull, who places thereon the superstructure, and who furnishes and attaches thereto the machinery

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intended for her propulsion, and necessary to create, complete and constitute her a steamboat, after the hull has slid from the ways into the water, would be a rule without a reason, as applied to the business of constructing steamboats for use upon the inland navigable waters of this country, and all the learning bestowed upon the admiralty branch of the law, could not commend it to us for fairness or sound sense. It frequently occurs that steamboats are drawn out of the water upon ways, for repairs, after having for some time been engaged in navigation. It would hardly be claimed that repairs thus made "upon land" were not in a proper case a lien upon the vessel.

The mere launching of the hull of an uncompleted steamboat, cannot give to the builder thereafter engaged in her construction, the lien of the maritime law.

The principles upon which the maritime lien is founded preclude its application to the construction of a vessel. The most familiar of those principles is, that by giving this preference and priority, this interest in the thing, it enables the master upon the credit of the vessel to obtain in the foreign port the supplies and repairs necessary to enable the vessel speedily to prosecute her voyage, and by that means the delay and expense required to communicate with the owner or charterer are avoided. This fosters, protects and encourages commerce, by giving security to the stranger who aids the vessel in her necessities, away from her home, and where the credit of her owners is unknown. By the master's act, and by reason of the necessity alone does this lien attach. "So that where the owner is present, no lien is acquired "by the material-man, nor is any when the vessel is supplied or "repaired in the home port. The lien attaches to foreign ships "and vessels only in favor of the carpenter who repairs in a case "of necessity, and in the absence of the owner. It would be a "strange doctrine to hold the ship bound in a case where the "owner made the contract in writing, charging himself to pay by

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"installments for building the vessel at a time when she was "neither registered nor licensed as a sea-going ship:" Steamboat Jefferson, 20 How., 402. While the vessel is building she has no home port, and no port is foreign to her. She is without name, enrollment, crew, or master. She is not engaged in commerce, and has no necessities.

The builder may secure himself by his agreement with the owners, by the lien of the local law, if one is given, or by the common law lien dependent upon possession. The repairer can have no common law lien, as the vessel is in the legal custody and possession of the master.

In accordance with numerous adjudications, no doubt a vessel of any character of sufficient tonnage to come within the rules in admiralty, which is used for the purposes of commerce and navigation upon any of the waters within the admiralty jurisdiction, whether such vessel be propelled by steam or other inherent power, by means of appliances with which the winds are utilized, by the currents of the water upon which it floats, or by other and extrinsic power, may be the subject of maritime liens for repairs, and such liens may be enforced whether such repairs be insignificant or amount to a complete reconstruction of the vessel, or an entire revolution in its mode of propulsion. But we find no adjudicated case which places a transaction such as in the case at bar, among the repairs of a vessel, and it is as we have seen for repairs and not for the creation of a vessel that the admiralty lien is given.

The contract under which the libellant, Rees, furnished the machinery and performed the labor was strictly a building contract, and therefore no lien is given him by the maritime law, and he claims none other.

The facts applicable to the claim of Blatt & Buerdorf, are as follows: Subsequent to the temporary enrollment at Pittsburgh, heretofore spoken of, the General Terry was not enrolled until

after her seizure and sale under these libels. To comply with the act of Congress she ought to have been permanently enrolled at Omaha, Nebraska, which was the port of entry nearest to the residence of her owners, who resided at Yankton, Dakota Territory, and such enrollment should have taken place upon her arrival at Omaha on her way to Yankton. For some unexplained reason, in her temporary enrollment papers she was designated as "of Omaha," but as the law requires shall be done, there was painted upon her stern, the place at which she was claimed as belonging, to-wit, "General Terry, of Yankton, D. T."

About one year after the Terry had been completed and in the spring of 1879, at Yankton, Dakota Territory, the libellants, Blatt and Buerdorf furnished, for the use of the steamboat, certain groceries, provisions and other boat stores, to be used by her crew and passengers upon an intended voyage up the Missouri and Yellowstone rivers. At the time these stores were furnished, the Terry was lying moored to the shore at Yankton. The majority of her owners then resided at Yankton, as did Walter A. Burleigh, her managing owner. Burleigh had always been her managing owner, and during the prior season of navigation, was her master, had been enrolled as such in the temporary enrollment, and no one had been substituted for him in that capacity, although when these supplies were furnished, preparations for a voyage were being made, and when she departed, it was with another person as master.

We assume for the purposes of this decision, although the evidence in the transcript led us to seriously question that fact, that these supplies were furnished by Blatt & Buerdorf upon the credit of the boat. They however, well knew where the steamboat was owned, who were the owners, that such owners, and the managing owner, Burleigh, resided at Yankton, and were of sufficient credit to obtain all needed supplies without resorting to the expedient of pledging the steamboat.

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We also assume that the supplies thus furnished were necessary to enable said vessel to proceed upon her intended voyage.

Upon the part of the libellants, Blatt & Buerdorf, the contention is that the home port of the vessel, is that port where she was or ought to have been enrolled, and which is nearest to the residence of her owners; that such port being Omaha, it was her home port, and when the Terry was at Yankton, she was in a foreign port, within the meaning of the maritime law, and for necessities there supplied upon the order of her enrolled master, Burleigh, a maritime lien attached.

Singular it is, but true, that the question as to what constitutes the home port of a steamboat engaged in the navigation of the inland waters of this country, cannot yet be said to be definitely settled, notwithstanding the lapse of so many years since the doctrine of the maritime law was extended to those waters beyond the ebb and flow of the tides.

Judge Deady, in the case of the "*Favorite*" 3 Saw., 411, uses "this language: "Under the ruling of the *Lottawana*, lately decided by the Supreme Court (21 Wal., 558,) what constitutes a "home port, is yet an open question. But I think upon reason "and convenience, the home port ought to be the one where the "vessel is enrolled; away from that place, whether in or out of "the state in which her owner resides, she is supposed to be *in itinere*, and therefore relying upon her credit for the purchase "of the necessary supplies to complete her voyage."

Judge Dillon, in the case of the "*Albany*" 4 Dill., 439, after quite an extended discussion and review of the authorities upon this subject, concludes: "My understanding of the decisions of the Supreme Court, as to the rights and remedies of material men, lead me in this case to these conclusions:

"1. That the *Albany* "belonged" to the state of Wisconsin, and that every port of that state was as respects material men, the

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home port of the vessel. The libellant, residing in and extending credit in that state, is, under the view of the Supreme Court, conclusively presumed to have extended it to the owner, who resided in the state, or to the master, and has no implied or maritime lien on the vessel. ”

“ 2. That as respects the rights and remedies of material-men, the home port or state of a vessel, is the state wherein the owner resides, and not the state or district in which she is enrolled, when the two are different. To hold in such a case that the *enrollment* controlled, would destroy the only foundation upon which a distinction between the rights of domestic and foreign material-men has been made, viz.: that the former are presumed to extend credit to the owner, whom they are supposed to know, or whom, at all events, they may pursue in the courts of their own states. ”

In the case of the “*Albany*,” the vessel was enrolled at Galena, in the state of Illinois. The supplies were furnished at La Crosse, in Wisconsin, and the owners resided at Boscobel, Wisconsin. The libel was dismissed for want of jurisdiction.

After an examination of all the cases upon this subject within our reach, we are satisfied the clear weight of authority, as well as the effect of the decisions of the Supreme Court of the United States, is with the doctrine that the home port of a vessel is any port of the state or territory where the owner, or if more than one, where the managing owner resides, so far as the question of home port affects the rights and remedies of the material-men.

Some discussion was had in this case, as to what constitutes a port within the meaning of the terms, home and foreign ports.

It must be held that a port upon the Missouri river is any place where steamboats may land with safety, and lie moored to the shore, and not merely those places designated by acts of Congress as ports of entry and for other purposes.

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We have not felt called upon to discuss the effect of furnishing upon credit supplies to a vessel in her home port.

Since the decision of the Supreme Court in the "*General Smith*" 4 Wheat., 438, it has been the settled law of this country that for supplies furnished a domestic vessel at her home port, the material man has no maritime lien.

The libellants, Blatt & Buerdorf, having furnished the supplies for which they claim a lien to the General Terry, at Yankton, while she lay moored to the levee at that place, and Yankton being the home-port of the Terry, by reason of the managing owner and a majority of her ownership residing there, it follows that they have no admiralty lien upon said steamboat, and therefore their libel must be dismissed.

It was suggested that some distinction may exist or be found between this and other cases upon the subject of the home-port, by reason of the residence of the Terry owners being in a territory, the cases examined speaking usually of the ports of the same *state*. We think the word *state*, as used, refers to the jurisdiction, and not merely to a sovereignty, and cannot have greater significance than would the word jurisdiction, or country, or territory. So far as the running of process, the facility for enforcing the claims of material-men against resident owners, a territory is as much of a sovereign, is as separate a jurisdiction, and possesses as much power as a state.

At all events, it can hardly be with reason urged that a vessel at a port in a territory where its owner resides, is in a foreign port, merely because the territory is subject to the jurisdiction of Congress, and does not possess the attributes of state sovereignty. A more plausible argument might be, that, inasmuch as the territory belongs to the people of all the states, no port in any state is foreign to a vessel owned in a territory.

As before stated, a small item in the libel of James Rees, is for

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material used for repair of the steamboat, which were furnished upon the order of Burleigh, the managing owner, and were shipped to, and taken upon the boat at Bismarck. Having held that any port within the territory of Dakota was a home-port of this steamboat, General Terry, that disposes of this item without the necessity of further notice.

The judgment and decree of the District Court dismissing the libels with costs is

AFFIRMED.

All the Justices concurring.

WILLIAMS V. NORTHERN PACIFIC R. R. CO.

1. ***TRESPASS: RIGHT OF WAY: STOCK MAY GO UPON.** In this territory the owner has a license to allow his cattle to run at large upon all lands, except cultivated or meadow lands, or young timber.
2. **NEGLIGENCE OF OWNERS: HAZARDOUS PLACES: CARE REQUIRED.** But where stock run at large in places extra hazardous, the owners are required to exercise an extra degree of care, and if a loss occurs which could have been prevented by the use of such care as the circumstances required, the R. R. Company is not liable, unless the injury was occasioned by wanton or reckless misconduct of defendant or its employees.
3. **NEGLIGENCE OF COMPANY: FACTS UNDISPUTED: QUESTION FOR JURY.** Even though the facts are undisputed it is for the jury, and not for the Judge, to determine whether proper care was exercised, or whether negligence appears, whenever, upon the facts in evidence, different minds might honestly draw different conclusions from such evidence.

Appeal from the District Court of Burleigh County.

The facts are stated in the opinion.

*But see amendment to herd law, Chap. 115, Laws 1883.

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Flannery & Wetherby, for defendant and appellant. Points and authorities cited:

There is no evidence of negligence. The fact, if it was established by the evidence, that the engineer did not see the cattle as far ahead as he might if he had been looking ahead all the time, would not be *per se* negligence. He had a right to assume that the track was clear. His first and paramount duty was to run his engine with reference to the safety of the persons and property on the train. In doing this, at the moment when the train approached the cattle, his attention might have been directed to the train or his engine: *Tonawanda R. R. Co. v. Munger*, 5 Denio, 267; 13 Ohio, N. S., 66; *Locke v. First Div. St. Paul & Pacific R. R. Co.*, 15 Minn., 362.

The only evidence on the question of negligence was the testimony of McDonough, the engineer. His evidence was all to the effect that the locomotive and train was run with ordinary care and prudence. There is no evidence of negligence in the case, and it was error for the Court to submit that question to the jury: Redfield on Railways, Vol. 1, p. 494; *Curry v. Chicago & Northwestern Railway Co.*, 43 Wis., 685; *Railroad Co. v. Skinner*, 19 Pa. St., 298.

It was error for the Court to take the question of whether it was negligence on the part of the plaintiff to allow his cattle to run at large along and upon the right-of-way and track of the defendant, from the consideration of the jury: *The Tonawanda R. R. Co. v. Munger*, 5 Denio, 259; Affirmed, 4 N. Y., 349; *Stucke v. Milwaukee & M. R. R.*, 9 Wis., 182; *Fisher et al v. The Farmers' Loan and Trust Co.*, 21 id., 74; Redfield on Railways, Vol. 1, p. 491, n. 17, and cases cited; Cooley on Torts, p. 654-5; *Indianapolis C. & L. R. R. Co. v. Harter*, 38 Ind., 557; *Curry v. Chicago & Northwestern Railway*, 43 Wis., 684.

In Massachusetts the rule is as to cattle trespassing upon the

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railroad track, the company is not liable for injury done them, except when it is occasioned by the gross negligence or reckless conduct of its employes: *Maynard v. R. R.*, 115 Mass., 460; *Darling v. R. R.*, 151 id., 118.

The same rule has been followed by the courts in other states: *Spinner v. N. T. C. & H. R. R. Co.*, 67 N. Y., 156; *Railway Co. v. Skinner*, 19 Pa. St., 298; *Jackson v. Rutland R. R.*, 25 Vt., 150; *Locke v. Fst. Div. St. Paul & P. R. R. Co.*, 15 Minn., 350; 34 Iowa, 506; 42 id., 424; 42 Vert., 375.

The Court, in his charge, when he told the jury that it was immaterial whether the cattle were rightfully or wrongfully upon the track, the defendant must exercise ordinary care to avoid injuring them, evidently lost sight of the different degrees of negligence, and erred: Civil Code, p. 504, Secs. 2100-2101; *Maynard v. R. R. Co.*, 115 Mass., 460; *Darling v. R. R.*, 121 id., 118; *Spinner v. N. T. C. & H. R. R. Co.*, 67 N. Y., 156; *Talmadge v. Rensselaer & Saratoga R. R. Co.*, 13 Barb., (N. Y.) 493; *Union Pacific Railroad Co. v. Rollins*, 5 Kansas, 168.

It is not contended that the defendant has the right to injure the cow or the man that is wrongfully upon its track. But the defendant has a right to run its train, assuming that the track is clear; and if the cow or man wrongfully on the track is injured, the defendant would be liable only when the injury was occasioned by the gross negligence of its employes: *Tonawanda R. R. Co., v. Munger, supra*, 13 Ohio, N. S., 66.

The Court assumes in his charge that it was the duty of the engineer to be looking ahead all the time; and charges the jury that if he was not, it was negligence or carelessness for which defendant would be liable. This was error: *Locke v. The Fst. Div. St. Paul & P. R. R. Co.*, 15 Minn., 362; 5 Denio, 267; 13 Ohio, N. S., 66.

Respondent's brief not on file.

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EDGERTON, C. J.—This is an appeal from a judgment rendered in favor of the plaintiff, and against the defendant in the District Court for Burleigh county.

The complaint alleges that certain cattle, the property of the plaintiff, casually, and without the fault of the plaintiff, strayed in and upon the railroad track, and grounds occupied by the defendant, and that the defendant by its agents and servants not regarding their duty in that respect, so carelessly and negligently ran and managed the locomotive, cars and train of the defendant, that the same ran against and over, killed and destroyed certain of the cattle of the plaintiff, to his damage in the sum of one hundred and twenty-five dollars. The complaint further alleges that the proper appraisalment was had and the proper notices given.

The defendant, in his answer, alleges that at the time mentioned in plaintiff's complaint, the plaintiff disregarding the rights of the defendant wilfully and negligently suffered and allowed his cattle to trespass upon defendant's right of way and road bed, and wilfully and negligently suffered and allowed his cattle to pasture and lie down on defendant's track on the site of the injury.

That on or about July 20th, 1878, while defendant, in its usual and ordinary course of business, was running a train of cars over its said road with ordinary care and prudence in the night time, unavoidably ran against some cattle which were lying and standing upon said track, and killed and injured some of plaintiff's cattle.

On April 19, 1880, the cause was tried by a jury and a verdict returned in favor of the plaintiff.

The defendant at the time objected to the admission of certain evidence offered upon the trial, which objections were overruled,

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and duly excepted to—and the defendant further excepted to certain portions of the charge of the court.

The defendant made a motion for a new trial, which was overruled, and judgment rendered in favor of the plaintiff, from which judgment the defendant brought his appeal to this court.

It is shown by the testimony, that the plaintiff had a herd of cattle in the charge of an employe, near the road of the defendant. That the cattle usually pastured on the vacant lands near the railroad during the day, and were yarded by night; that on the night of the accident they were last seen by the person in charge of the same, near dark in the direction of the track.

Mr. Stevens, the employe in charge of the herd, a witness on the part of the plaintiff, testified as follows, upon cross examination:

“Mr. Williams left these cattle in my charge, I should think about two months before, don’t know exactly. I tended them part of the time myself, part of the time had a herder with them. There was a herder with them most of the time for the two weeks previous in the day time. They looked after themselves at night. I saw them about four or five o’clock the night before they were killed; they were about four or five hundred yards from my house; they were toward the railroad track, because the track sweeps around my house; they were not toward the nearest point, about east; toward the siding, as you might say; that is toward the railroad track; they were from a quarter to a half a mile from the track. My house is nearly a half a mile from the track; they were a little nearer; I think they were from 120 to 125 rods from the track; I saw them just before I ate supper; I usually eat about five o’clock. When I went to supper, they were about a third of the distance to the track, coming toward the house; I thought likely they were coming to the house; I did not see them after that, that night; I was tending the cattle then; I worked in

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the garden; I did not usually let the cattle run at large where they pleased. No sir, I did not let them go across the railroad track; not to say they never went across it; it was my custom almost invariably to turn them the other way, to drive them, to herd them the other way. I never noticed or saw any fence between my place and the railroad track, except what is termed a snow fence; I don't think there was any fence, only a snow fence; I did not allow the cattle to go on the track; I don't know much about the right of way; I allowed them to graze toward the railroad in that direction; I did not allow them on the track; they grazed along near the track, occasionally; I kept them in a corral nights; I did not watch them myself nights; I kept them in a corral at the house; they were never out of the corral while I had them, except this one night, when they were killed, and one night before. The reason why I did not put them into the corral that night, I went in to my supper, and expected to put them in when I came out. I went out for them after supper. Not seeing them, I got onto my pony and started after them; I did not find them; I hunted until dark, then of course I could not hunt any longer."

There was no other evidence in reference to the care of the cattle, or the negligence, if any, of the plaintiff.

The evidence of the defense showed that it was a dark and stormy night; that the train was running about fifteen miles per hour, the ordinary rate of running freight cars. The engine had the usual head light, the engineer on the lookout; that the cattle were not discovered till the engine was within sixty or seventy feet of them; that one of the cattle was lying down on the track; that when the engineer saw the cattle, he blew the whistle for brakes, and reversed the engine.

There was no attempt on the part of the plaintiff to show that the employes in charge of the train were reckless or grossly neg-

ligent in running the same, but that they did not exercise *ordinary* and *reasonable* care.

Upon this subject the court charged the jury as follows:

“ Upon the question of the cattle being upon the railroad right of way, and being there without right, I will take the responsibility of taking that part of it away from you. It is true that the cattle were trespassers,—that is, the owner of the cattle was liable for trespass by allowing his cattle to run at large, or upon the right of way; they had no business there; they were upon the property of this corporation, where they should not have been. If, however, you find from the evidence that the cattle were there, that part of the question, and whether they were there rightfully or not, in other words, assuming that they were there without right, that does not relieve the railroad company from the obligation that they are under, and always under, to exercise reasonable care, vigilance and diligence in the running of their cars—in the running of their engines. They have no more right to injure the cow, or the horse, or the man that is wrongfully upon their track, than they have the man that is rightfully there, or stock that is rightfully there.” To which charge the defendant duly excepted.

The learned Judge in his charge seems to have either ignored the whole question of contributory negligence, or to have determined as a matter of law that there was nothing proven in this case *tending* to show contributory negligence on the part of the plaintiff.

While we are not prepared to adopt the rule which obtains in many of the states, that “ Though his (the plaintiff’s) beasts escaped from a well fenced field, without any actual carelessness on his part, when they came upon the defendant’s track they were trespassers there, and the defendant owed him no duty there, save not to wilfully or recklessly injure them.” (See 67 N. Y., 156.)

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Neither are we prepared to say, that a plaintiff shall recover when guilty of negligence contributory to the injury, unless the loss occurred by the reckless or wanton misconduct of the defendant or those in charge of the management of the train.

In this territory the plaintiff has a license to allow his cattle to run at large upon all lands except cultivated, or meadow lands, or young timber. The common law upon this subject does not obtain here. But while within certain limitations the owners have a license to allow their cattle to run at large, yet if they are in places *extra hazardous*, the owners are required to exercise an extra degree of care in taking care of their cattle; and if an accident occurs, which could have been prevented by the use of such care as the circumstances of the case required on the part of the owners, then they cannot recover, unless the loss was occasioned by the wanton or reckless misconduct of defendant or its employees. As to what may constitute contributory negligence on the part of the plaintiff in cases like this, Thompson, in his work on "Negligence," says: "The negligence of the plaintiff, in order to bar his recovery, must have been so far an efficient cause of the injury, that unless he had been negligent the injury would not have happened; or, as the rule is often expressed, although there may have been negligence on the part of the plaintiff, yet unless he could by the exercise of ordinary care have *avoided the consequences of the defendant's negligence*, he is entitled to recover. * * * * Perhaps a better expression of this rule is, that although the plaintiff has negligently exposed himself or his property to an injury, yet if the defendant, *after discovering the exposed situation*, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages." * * * The same author lays down the general rule, that to disentitle the plaintiff from recovering, two things must concur:

- 1st. A want of ordinary care on his part.

2d. A proximate connection between this ordinary care and the injury.

It is not for us to determine whether the plaintiff was guilty of contributory negligence or not; but whether enough appears in the evidence to submit that question to the jury.

Thompson, in the same work above cited, on page 1236, says: "It is frequently stated, that when the facts are undisputed, or conclusively proved, the question of negligence is to be decided by the Court. A better opinion, however, would seem to be, that in order to justify the withdrawal of the case from the jury, the facts of the case should not only be undisputed, but the conclusions to be drawn from those facts, indisputable. Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should properly be left to the jury."

In case of *Railroad Company v. Stout*, reported in 17 Wallace, 745, the court say upon this question, "Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard; the merchant; the mechanic; the farmer; the laborer. These sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser

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and safer conclusions from admitted facts thus occurring than can a single Judge."

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the Judge to determine whether proper care was given, or whether they establish negligence.

In *Redfield*, on the law of "Railways," it is said: "And what is proper care will be often a question of law, where there is no controversy about the facts. But ordinarily we apprehend where there is any testimony tending to show negligence, it is a question for the jury."

In *Patterson v. Wallace*, [28 Eng. L. & Eq., 48,] there was no controversy about the facts, but only a question whether certain facts proved established negligence on the one side, or rashness on the other. The Judge at the trial withdrew the case from the jury, but it was held in the House of Lords to be a pure question of fact for the jury, and the judgment was reversed.

In *Mangam v. Brooklyn Railroad*, 38 N. Y., 455; the facts in relation to the conduct of the child injured; the manner in which it was guarded, and how it escaped from those having it in charge, were undisputed. The judge at the trial, ordered a nonsuit, holding that the facts established negligence in those having the custody of the child. The court of appeals of the state of New York, held that the case should have been submitted to the jury, and set aside the nonsuit.

In *Detroit and W. R. R. Co. v. Van Steinberg*, (17 Mich., 99,) the cases are largely examined, and the rule laid down, that when the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination.

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We are of the opinion that the court below erred in the charge given herein. The judgment is reversed, and the case remanded for new trial.

All the Justices concur.

GARRETSON V. PURDY, ADMINISTRATOR.

1. **PROMISSORY NOTE: ATTORNEY FEE CLAUSE: DESTROYS NEGOTIABILITY.** The insertion of a stipulation for payment of a reasonable attorney fee in a promissory note, destroys its negotiability, and renders it subject to all defenses which the maker had against the original payee, even in the hands of an innocent purchaser for value.

Appeal from the District Court of Yankton County.

The note upon which this action was brought, is as follows:

“ \$200. Marshalltown, Iowa, July 12, 1879.”
 “ One year after date I promise to pay to the Hayworth Fence
 “ Co. or bearer, at Marshalltown, Iowa, two hundred dollars, with
 “ interest at ten per cent. per annum, payable annually, ten per
 “ cent. on interest due, and if action is commenced hereon, attor-
 “ ney’s fee for collection. J. M. STONE.”

The remaining facts are stated in the opinion.

N. J. Cramer, for appellant. Points and authorities cited:

The stipulation in the note to pay attorney’s fees does not render the amount of the note indefinite or uncertain, because the attorney fee clause does not become operative until after the note has lost its character as negotiable paper by failure of payment at maturity. Until the note matured, the amount to be paid was definite and certain; when over due, its career as negotiable paper was ended; and then, for the first time, the amount became uncertain, or might become so by the commencement of an action. The Court erred in instructing the jury, that the note is not such

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a one as to exclude equities in the hands of an innocent purchaser for value: *Stoneman v. Pyle*, 35 Ind., 103; *Nickerson v. Sheldon*, 33 Ill., 373; *Sperry v. Horr*, 32 Iowa, 184; *Heard et al v. Dubuque City Bank*, 8 Neb., 10; *Kemp v. Flaus*, 8 Neb., 24; *Seaton v. Scovell*, 18 Kan., 433; *Gaar. &c. v. Louisville Banking Co.*, 11 Bush., (Ky.) 80; *Hovenstein v. Barnes*, 5 Dillon, 482; 37 Ind., 512, following 35 Ind., 103.

A stipulation for the payment of exchange does not destroy the negotiable character of the note: *Johnson v. Frisbie*, 15 Mich., 286; *Smith v. Kendall*, 9 id., 241; *Leggett v. Jones*, 10 Wis., 34; *Grutacap v. Woullnise*, 2 McLean, 581; 57 N. Y., 573; *Bradley v. Lee*, 4 Bissell, 473; *Wood v. Lee*, 84 Pa., 407.

C. J. B. Harris, for respondent. Points and authorities cited:

Do the words, "If action is commenced hereon, attorney's fee "for collection," destroy the negotiability of the note in suit? We contend that our Code settles this question, independently of the decisions of state courts: See Secs. 1821, 1822, 1827, Civil Code.

Our Code has evidently taken the same side of this mooted question taken by the Supreme Courts of Pennsylvania, Missouri, Illinois, Minnesota, South Carolina and New York: *Wood v. North*, 84 Pa. St., 407; *First Nat. Bank v. Gay*, 63 Mo., 34; *Samstag v. Conley*, 64 id., 476; *Lome v. Bliss*, 24 Ill., 168; 12 Rich., (S. C.) 445; *Jones v. Radatz et al*, 6 N. W. Rep., 800; *Austin v. Burns*, 16 Barb., 643; 2 Barn. & Ad., 660; 4 id., 69; 1 Parsons' Notes and Bills, 37; 2 id., 117; Edwards on Bills, 136; Smith's Merc. Law, 253.

In the states holding the opposite rule, the decisions of the courts are governed by statutory provisions. The Indiana statute provides that *all* promissory notes shall be negotiable. And see Ky. Gen. Stats., 249, Sec. 5. In Nebraska attorney's fees become part of the taxable costs.

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In all states adhering to the common law, or having no statutory definition of negotiable instruments, or having a statutory definition similar to the common law, the decisions have held that these stipulations destroy the negotiability of the instrument.

EDGEERTON, C. J.—The appellant brought an action in the Second Judicial District Court, for the county of Yankton, against the respondent as administrator of the estate of James M. Stone deceased, alleging the death of the said James M. Stone, and the appointment of the respondent as administrator, and further alleging that the said Stone, on July 12, 1879, made his promissory note whereby he promised to pay the Hayworth Fence Company, or bearer, one year after date, the sum of two hundred dollars, with interest at 10 per cent., and if action be commenced thereon, attorney's fees for collection; that plaintiff purchased the said note before due without notice.

The answer puts in issue, the negotiability of the instrument, alleges that the same was given without consideration, and that the same was obtained by means of certain false statements and representations of one McKewon, a person representing himself as the agent of the payee.

On January 20th, 1882, the cause was brought on for trial, and after the evidence was concluded upon both sides, the court among other matters charged the jury as follows:

“It is a necessary quality of negotiable paper that it should be simple, certain and unconditional. And I instruct you that the note sued upon is not such a one as to exclude equities in the hands of third parties, if purchased before due.”

To the giving of said instructions the plaintiff excepted. The jury returned a verdict for the defendant, and judgment was entered against the plaintiff for the costs. From this judgment the plaintiff appeals to this court.

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The only question before us is whether the instrument sued upon is negotiable. The plaintiff, in the court below, sought a judgment not only for the amount of the note and interest, but also for the attorney's fees for collecting the same. There was no amount named in the instrument as attorney's fees, consequently it was necessary that the sum to be allowed for that service, if any, should be passed upon by the jury after competent proof of the value thereof. By the Code of this territory, no costs are taxed to the prevailing party, except mere disbursements which are denominated costs.

How far this question of embracing in a promissory note an additional contract, affects its negotiability, is not a new one in the courts of the different states.

The courts of Indiana, Kentucky, Iowa, Nebraska and Kansas, have decided that notwithstanding the additional contract, the note still remains negotiable. Yet in the most of these states—notably Indiana and Kentucky, this construction is more or less influenced by the peculiar laws of those states, in reference to negotiable instruments.

The appellant cites the case of *Nickerson v. Sheldon*, decided by the Supreme Court of Illinois, and reported in Vol. 33 of the reports of that state, page 373. The case is not a parallel one, nor does the reasoning of the court sustain the position of the appellant in this case.

The court says, "But it is objected that the note sued upon was not negotiable under the statute. This objection is predicated on this clause in the instrument."

"We further agree, that, if the above note is not paid without suit, to pay ten dollars in addition to the above for attorney's fees."

"It is said this undertaking destroys the instrument as a promissory note, since it requires extrinsic evidence to show that

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“ the note was not paid without suit, and the case of *Lowe v. Bliss et al*, 24 Ill., 168, is referred to in support of the objections. In that case, the note was for a sum of money payable at the Kankakee bank, Kankakee, Illinois, value received with current rate of exchange on New York. This stipulation for current rate of exchange on New York, made the amount due by the note uncertain, and so deprived it of its negotiability. But the amount due by this note is absolutely certain, and it possesses all the requisites of a negotiable instrument under the statute. *Stewart et al v. Smith*, 28 Ill., 397. There is no uncertainty as to the precise sum of money to be paid on the maturity of the note. *Houghton et al v. Francis*, 29 id., 244. The plaintiff does not declare for the ten dollars, nor was it allowed to him in the assessment of damages. He recovered only the principal and interest due upon the note.”

The Supreme Courts of Pennsylvania, Minnesota and Missouri, have decided that such notes as the one sued upon in this case, are not negotiable. In the case of *Woods v. North*, reported in 84 Pa. St. Reps., on page 410, where an action was brought on a note containing a provision for *five per cent. collection fee*, if not paid when due, the court says: “ But a collateral agreement as here, depending too as it does upon its reasonableness, to be determined by the verdict of a jury, is entirely different. It may be well characterized, like an agreement to confess a judgment was by Chief Justice Gibson, as “luggage,” which negotiable paper, riding as it does on the wings of the wind, is not a courier able to carry. If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the wrong direction which costs. Those instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties, contentions and litigation result.”

In the case of *Jones v. Radity*, decided by the Supreme Court of Minnesota, and reported in Vol. 6, of N. W. Rep., page 800,

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in a case very similar to the one at bar, the court say: "The instrument before us has this certainty as to the \$135 and the interest. But the whole instrument must be taken together. The promise to pay the \$135 and interest is not the whole of the promise—not the entire obligation created. The entire promise and obligation is to pay absolutely that sum and interest, and in a particular contingency, to-wit: the bringing suit by the payee after default, to pay a further amount not fixed and not capable of being ascertained from the instrument itself. The suggestion in some of the cases—*Sperry v. Hoar*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kan., 433—that a stipulation to pay attorney's fees in case of suit, relates merely to the remedy, is not sound. For the payee, if he recover on that part of the promise, must recover, not because he is obliged to bring suit, but because it is part of the contract and obligation of the maker, on which the suit is brought, that he will pay them upon the specified contingency. Those cases, and *Gear v. Louisville Banking Co.*, 10 Bush., 180, appear to advance the proposition that an instrument may be negotiable if the amount with which it may be discharged at maturity, be fixed and certain, even though the amount required to discharge it after it has passed maturity or recoverable upon it in an action, be entirely indefinite and uncertain. We think the certainty requisite to the negotiability of the instrument must continue until the obligation is discharged, and that any provision which before that time removes such certainty, prevents the instrument being negotiable at all. The stipulation in this instrument for payment of reasonable attorney's fees introduced into the obligation an element of uncertainty, which prevented the instrument being a negotiable note. It was, therefore, after its transfer to plaintiff, still subject to all defenses which the maker had as against the original payee."

We believe that promissory notes, to be negotiable, must be unincumbered by collateral agreements to be determined by a jury,

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the better rule, more in conformity to the common law and the weight of authority.

But independent of these conflicting decisions, and independent of the common law upon this question, the law of this territory provides, in the Civil Code under the title of "Negotiable Instruments," as follows:

"Section 1821: A negotiable instrument is a written promise " or request for the payment of a certain sum of money to order " or bearer in conformity to the provisions of this article."

"Section 1822: A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment."

"Section 1827: A negotiable instrument must not contain any other contract than such as is specified in this article."

And again, in section 6 of the Civil Code, "In this territory there is no common law in any case where the law is declared by the codes'

In view of these express declarations in our Code as to negotiable instruments, we are of opinion that the charge of the Judge in the court below was correct. The judgment is

AFFIRMED.

All the Justices concur.

CAMPBELL V. WAMBOLE ET AL.

1. PRACTICE: DEMURRER: GOOD CAUSE OF ACTION AS TO ONE OF SEVERAL DEFENDANTS. Where the complaint, in an action to reform and foreclose a mortgage against several defendants, states a good cause of action against any one of such defendants, a general demurrer by all the defendants should be overruled.

Appeal from the District Court of Yankton County.

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Demurrer to complaint. The substance of the pleadings is stated in the opinion.

Tripp and *Boyles*, for appellant. Points and authorities cited:

This is a general demurrer by all the defendants, and if the complaint states a cause of action against one of the defendants the general demurrer must be overruled: *Dunn v. Gibson*, 4 N.W. Rep., 244, S. C., 9 Neb., 513; *Mis. Valley Land Co. v. Bushnell*, 8 N. W. Rep., 389; *Willard et al v. Reas et al*, 26 Wis., 544; *Webster, Admr., v. Tibbets*, 19 Wis., 438; *Brownson v. Gifford*, 8 How. Pr., 389; *Phillips et al v. Hagaden et ux*, 12 How. Pr., 17; *Eldredge v. Bell*, 12 How. Pr., 547; *People v. Mayor New York*, 17 How. Pr., 56; 17 Ind., 291-3.

Plaintiff declares upon the promissory note of Wambole, and asks a personal judgment against him. It is too late in the history of Code practice to say this is a suit in equity, and equitable relief being desired, the cause must be dismissed and the party sent to the law side of the court.

Again, Charles Wambole is a party to the mortgage. The mortgage nor complaint do not state what his interest is in the mortgaged premises, but whatever it is we have a right to foreclose it at least—not only what his interest was at the execution of the mortgage, but any after acquired interest in the mortgaged premises: Civil Code, Sec. 1727.

It is stated in the complaint that the heirs have succeeded to the interest of Elizabeth Wambole in the mortgaged premises. Charles Wambole as husband, under our law, would take a one-third interest as heir of the wife. Whatever her interest may have been, that interest inures to the benefit of this plaintiff in like manner as if acquired before execution of the mortgage: *Parry v. Kelly*, 52 Cal., 335.

Under our statute both real and personal property pass direc

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to the heir, subject to being subsequently applied to payment of debts: Sec. 777, Civil Code; Secs., 122, 123, 163, 272, Probate Code.

In California the real and personal property pass in the first instance to the administrator as trustee for payment of debts, and to the heir on distribution of the estate: Cal. Civil Code, Sec. 1384, and note. But this gives the administrator a possessory interest, and a right under order of Probate Court, to sell property for payment of debts, and no further interest or powers: *Brenham v. Story*, 39 Cal., 179. If no debts there need be no administration: *Parry v. Kelley*, 52 Cal., 334.

N. J. Cramer, for respondent. Points and authorities cited:

All the defendants, including Charles Wambole, succeeded to the lands sought to be reached in this action, as heirs of Elizabeth Wambole, deceased. But the administrator of the estate is entitled to possession of such lands during administration, and the interest of such heirs requires the joinder of the administrator as a party to this action. Will the court reform a mortgage when a party entitled to possession of the premises is not before the court? Civil Code, Sec. 777; Prob. Code, Secs. 122, 123, 162, 210, 211; *Hillman v. Hillman*, 14 How., 460; *Newbould v. Warren*, 14 Abb., 80; *Wallace v. Eaton*, 5 How., 90; *Perkins v. Church*, 31 Barb., 84; *Harwood v. Marye*, 8 Cal., 580; *Bellock v. Rogers*, 9 Cal., 123; 2 Barb. Ch. Pr., 176; 2 Wait's Prac., 449; 2 Jones on Mort., 1414.

EDGERTON, C. J.—This was an action brought in the Second Judicial District Court for the county of Yankton to reform and foreclose a mortgage on certain real estate, which mortgage was made and executed by Elizabeth Wambole, together with the defendant, Charles Wambole, her husband, to the plaintiff, to secure

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the payment of a promissory note made by the mortgagors, of that date, to the plaintiff. The complaint further alleges *inter alia*, that there was a mistake in the description in the mortgage; and that "on the 21st day of December, 1879, the said Elizabeth Wambole died intestate; that the defendants are sole heirs of said deceased, and have succeeded to the estate and interest of said Elizabeth Wambole in said mortgaged premises, and are now the owners and holders thereof, and that no other person has, or claims to have, any title or interest in or to the same, to the knowledge of this plaintiff; that said defendants, Josephine Wambole, Elizabeth Wambole and James Arthur Wambole, are minors; that on the 3d day of May, 1880, the defendant, Charles Wambole, was duly appointed guardian of the persons and estates of said minor heirs of said Elizabeth Wambole, deceased."

And the plaintiff further states, "That the said Elizabeth Wambole, deceased, did not in her life time, nor has the defendant, Charles Wambole, or the heirs of said deceased, or any or either of them, complied with the conditions of said mortgage, or note, by paying the said sum of twenty-two hundred dollars, with interest, as therein specified, which became due and payable on the 25th day of August, 1879; but that the whole remains due and unpaid."

"The plaintiff therefore demands judgment:

"1st.—That said mortgage may be reformed and the description amended as aforesaid.

"2nd.—For the amount of principal and interest which may be found due to the plaintiff on said note and mortgage at the date of such judgment, and costs and expenses of this action."

"And the defendants and all persons claiming under them, subsequent to the commencement of this action, may be barred and foreclosed of all right, claim and equity of redemption in the said mortgaged premises and every part thereof; that the said premises

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“ may be decreed to be sold according to law; that out of the mon-
“ eys arising from the sale the plaintiff may be paid the amount
“ adjudged to be due him on said note and mortgage, with interest
“ to the time of such payment, and costs and expenses of sale, so far
“ as the amount of such moneys, properly applicable thereto, will
“ pay the same; and that the defendant, Charles Wambole, may be
“ adjudged to pay any deficiency which may remain after applying
“ all of said moneys so applicable thereto; and that the plaintiff
“ may have such other and further relief in the premises as shall
“ be just and equitable.”

To this complaint the defendants demurred. The demurrer was brought on for a hearing, and the Court—

“ *Ordered*, That said demurrer be sustained, and that said de-
“ fendants have judgment thereon with costs;” and judgment was thereupon entered in favor of defendants and against the plaintiff.

It is admitted that the demurrer should have been overruled in this case, provided the complaint states a cause of action against any one of the defendants.

The complaint alleges that the defendant, Charles Wambole, was one of the makers of the mortgage, and also one of the makers of the promissory note which the mortgage was given to secure.

By the Civil Code of the territory, whatever interest or estate in the property described in the mortgage, or any portion of the same, the defendant, Charles Wambole, had in his own right at the time this suit was brought, whether acquired before or after the mortgage was given, was subject to this mortgage, and could be foreclosed. Sufficient appears by the complaint, if true, to show that this defendant had such an interest or estate in the lands mortgaged at the time this suit was commenced.

And again, the complaint further shows the defendant, Charles Wambole, was one of the makers of the note, and consequently was liable thereon.

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The defendant, Charles Wambole, at least, is not in a situation to demur to this complaint. It is therefore unnecessary to review or pass upon the other questions presented on this appeal.

The judgment of the District Court is reversed and the case remanded.

All the Justices concurring.

OCTOBER TERM, 1882.

PRESENT:

HON. ALONZO J. EDGERTON,	CHIEF JUSTICE.
HON. JEFFERSON P. KIDDER,	} ASSOCIATE JUSTICES.
HON. GIDEON C. MOODY,	
HON. SANFORD A. HUDSON,	

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1. **PLEADING: AMENDMENT: MANNER OF.** An amended pleading takes the place of the pleading amended, and the original drops out of and ceases to be a part of the record. The mode of amending pleadings recognized by our practice, is by rewriting the pleading, leaving out such allegations, and inserting such other allegations as may be desired; so that all the parts of the pleading shall be in one instrument, complete in itself.
2. **SAME: IRREGULARITY IN MODE OF.** A mere irregularity in the mode of amending a pleading, which does not affect the substantial rights of the parties in the case, and to which the attention of the District Court was not called, cannot be taken advantage of for the first time upon appeal.
3. **EVIDENCE: GENERAL EXCEPTION TO: WHEN UNAVAILING.** Where an objection to evidence could have been obviated upon the trial, if specifically pointed out, an exception which does not specifically point out such objection will be unavailing upon appeal.

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4. **SAME: SECONDARY EVIDENCE.** The rule requires an objection to secondary evidence to be made specifically upon the ground that it is not the best evidence; and the objection to the introduction of a written instrument in evidence, because its execution has not been proven, must be made upon that specific ground, to be of avail in a bill of exceptions.
5. **SAME: WHEN SUFFICIENT.** If the objection goes to the merits, and cannot be obviated, then a general objection may suffice; because in such case the evidence cannot be made available to the party by any subsequent acts.
6. **SAME: READING DEPOSITIONS: OBJECTIONS TO.** General objections and exceptions were taken to the reading in evidence of depositions. The specific objections—first, that it does not appear in the evidence that the witness was proven to have been out of the county; second, it does not appear that a notice of the taking was appended to the deposition, are taken for the first time in this court: Held, That this court will not consider such general exceptions.
7. **SAME: PRESUMPTION OF REGULARITY IN.** In the absence of it appearing affirmatively that no such proof was made, and that the reading of the deposition was objected to on that specific ground, this court will presume sufficient grounds were laid, and sufficient proof was made to authorize the reading of the depositions.
8. **CORPORATION: SUFFICIENT TO SHOW DE-FACTO EXISTENCE OF.** Evidence of the acts of the plaintiff as a corporation in good faith, and the expenditure of many thousands of dollars in the conduct of its business in this territory, together with other facts: Held, sufficient to establish its defacto existence, no proofs being offered to the contrary.
9. **INDIAN COUNTRY: MINING CLAIMS: NO RIGHTS ACQUIRED.** No rights could be acquired to any lands in the Black Hills prior to the 28th of February, 1877, by reason of the existence, until that time, of the Sioux Indian reservation, covering that part of the territory; following the decisions of this court in *Uhlig v. Garrison*, 2 Dak., 71; *French v. Lancaster*, id., 276.
10. **SAME: PARTY IN POSSESSION ON FEBRUARY 28, 1877: MIGHT ADOPT PRIOR ACTS OF LOCATION: AND DATE RIGHTS FROM THAT DAY.** A party in possession of a mining claim on the 28th day of February, 1877, with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, could, by manifesting his adoption of these facts, and subsequently causing a proper record to be made and performing the amount of labor, or making the improvements necessary to hold the claim, date his rights from that day; and such location and subsequent labor and improvements would give him the right to possession from that date.

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11. **EVIDENCE OF PRIOR ACTS OF LOCATION: IMMATERIAL FINDINGS: ERROR WITHOUT PREJUDICE.** The cause being tried by the court, and evidence having been received and findings of fact made of matters occurring prior to February 28, 1877; the findings distinctly and clearly discriminating between acts done before, and those done after said date; the evidence fully supporting the findings, and the findings fully authorizing the judgment in plaintiff's favor: Held, That the defendants could in no wise be prejudiced by such immaterial evidence and findings.
12. **SAME.** Immaterial findings which are not the basis of the judgment, other sufficient findings appearing in the record, will not vitiate the judgment or cause its reversal; following the decision in *Golden Terra Mining Co. v. Smith*, 2 Dak., 377, and distinguishing the case of *French v. Lancaster*, 2 Dak., 276, the latter case having been tried by a jury..
13. **PRACTICE: CANNOT TRY CASE ANEW.** Under the practice act of this territory now in force, this court in this case is empowered to correct the errors occurring in the District Court, but cannot try the case anew upon the evidence.
14. **SUFFICIENCY OF EVIDENCE.** It is the province of the District Court to weigh the evidence and determine its preponderance between the parties. If there is a substantial conflict in the evidence, and the material findings are supported by sufficient and substantial evidence, this court cannot say the District Court erred in its findings; and exceptions to the decision for insufficiency of the evidence to sustain it, are not well founded.

Appeal from the District Court of Lawrence County.

The facts appear in the opinion.

McLaughlin & Stesl, for defendants and appellants. No brief on file.

W. H. Claggett and *T. L. Skinner*, for plaintiff and respondent. Points and authorities in brief:

It is material to show plaintiff's articles of incorporation, and that they were accepted and acted upon: 1 Greenleaf, p. 388, Sec. 28. The incorporation of a foreign corporation may be proved by a certified copy of its articles of incorporation on file with the Secretary of this territory: Civil Code, Secs. 391, 567; Greenleaf

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Ev., Sec. 487, 498; Whart. Ev., 119-20; Civil Code, (Cal.) Sec. 296; Rev. Stats., (U. S.) Sec. 906.

Admitting immaterial evidence on trial will not reverse unless it appears that the Court acted upon such evidence and was influenced by it: *Golden Terra Mining Co. v. Smith*, 2 Dak., 374; *French v. Lancaster*, 2 Dak., 346; *Caulfield v. Bogle*, 2 Dak., 464; *Forest v. Forest*, 25 N. Y., 501; *Speers v. Fortner*, 6 Iowa, 556; *Green v. Allen*, 32 Ala., 215; *Zugler v. Wells—Fargo*, 28 Cal., 264; *S. B. L. A. v. Christy*, 41 Cal., 501; *Baldwin v. Bonheimer*, 48 Cal., 433; 12 Wend., 41.

The Court did not err in admitting in evidence the rules and regulations of quartz miners of Whitewood Quartz Mining District: Rev. Stats., (U. S.) Sec. 2324; *Strange v. Ryan*, 46 Cal., 33; *Golden Fleece Co. v. Cable Co.*, 12 Nev., 312; *S. C. G. & M. Co. v. E. M. Co.*, 15 Nev., 383; *N. N. M. Co. v. O. M. Co.*, 6 Sawyer, 299; *Mallett v. Uncle Sam M. Co.*, 1 Nev., 188; *Gleason v. White*, 13 Nev., 443; *Harvey v. Ryan*, 42 Cal., 626.

When matters of evidence or record have been destroyed correct copies may be substituted and used in their place: Code Civil Proc., Sec. 525; *Golden Terra Min. Co. v. Smith*, 2 Dak., 374; 1 Greenleaf Ev., 508, 509, 558. General exceptions will not be considered: *Caulfield v. Bogle*, 2 Dak., 464; *French v. Lancaster*, 2 Dak., 276; *Brown v. Tolls*, 7 Cal., 398; *Butterfield v. C. P. R. R. Co.*, 37 Cal., 383; *Brumagim v. Bradshaw*, 39 Cal., 33; 36 Cal., 120; 35 Cal., 32; 45 Cal., 275; 38 Cal., 287; 54 Cal., 589; 7 Nev., 153.

This court will not disturb the findings nor decision of the court below when the evidence was conflicting: *Hawkins v. Abbott*, 40 Cal., 639; *Lick v. Madden*, 36 Cal., 208; 39 Cal., 407; 44 Cal., 139; 12 Cal., 27; 50 Cal., 222; 40 Wis., 52; 39 Wis., 247; 44 Wis., 620; 20 Iowa, 276; 2 Utah, 281; id., 337; 24 Minn., 169;

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20 Minn., 9-13; 37 Wis., 327; 50 Iowa, 180; 19 Minn., 231; 12 Minn., 298-303; 2 Utah, 344; 6 Minn., 98.

MOODY, J.—This action was brought to determine conflicting claims to mining ground situated in Whitewood Quartz Mining District, Lawrence county. The plaintiff claims by virtue of the Caledonia location, and the defendants by a location called the Bobtail. The defendant, Noonan, claiming to be the owner of the Bobtail, applied for a patent, and pending that application, after making the requisite protest to stay the issuance of patent, the plaintiff brings this action. The trial was to the Court without a jury; judgment was rendered for the plaintiff, and the defendants appeal.

Ninety-eight assignments of error appear in defendants' brief, being the same as those stated in the motion for a new trial; all of which, that it is important should be now noticed, can be classified and disposed of in four general propositions. The *first* relates to the manner of making an amendment to the complaint, and making the defendant, Mahan, a party thereto during the trial. The *second*, to the admission of certain secondary evidence and depositions. The *third*, to the admission of evidence of acts of location performed, and declarations made regarding the disputed claims, prior to the 28th day of February, 1877, and while they were still covered by the Great Sioux Indian reservation; and *fourth*, to the alleged insufficiency of the evidence to sustain the findings and decision of the District Court.

Notwithstanding the defendant, Noonan, when he applied for the patent, claimed to be the sole owner of the Bobtail, and to take the title to himself, and that the action was brought upon that theory, it became apparent during the progress of the trial, that his grantor, Thomas F. Mahan, who claimed still to have an

interest in the claim, was a proper, if not a necessary party, to a complete determination and settlement of the question involved in the controversy. And thereupon by consent of all the parties, the Court made an order making Mahan a party defendant, and the following minute was entered in the journal, after the title:

“Now, on this 15th day of July, A. D. 1880, the trial of this
“cause resumed. By consent of all parties Thomas F. Mahan is
“made a party defendant in this action. Counsel for defendant
“appear and answer instanter for him any amendments to plead-
“ings required during the pendency of this action or at its con-
“clusion.”

The authority to cause such an amendment to be made cannot be doubted. Section 142, Code of Civil Procedure, among other things, provides: “The court may before or after judgment, in
“furtherance of justice and on such terms as may be proper,
“amend any pleading, process or proceeding, by adding or striking out the name of any party,” etc.

Mahan was in court as a witness, and was assisting in the conduct of the defense, and, upon such consent order being made, the attorneys for the other defendant of record at once appeared for him; the understanding being had that thereafter, and before judgment, the pleadings should be arranged accordingly. Thereupon the trial proceeded with the two parties defendants, they joining in all subsequent proceedings, including the motion to correct the findings, motion for a new trial, objections, exceptions, etc., and they join in this appeal. Before judgment, and when the plaintiff's counsel came to perfect the record as to Mahan, instead of re-writing the complaint and inserting the name of Mahan where it would properly come, as is the regular and much the better practice, they made and served upon defendants' counsel, and filed with the judgment roll, an amendment to the complaint in these words, after the title: “Now comes the above named plaintiff

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“ and in pursuance and by authority of the court hereinbefore
“ made on the 15th day of July, 1880, making the said Thomas
“ F. Mahan a defendant in this action, amends its amended and
“ substituted complaint, which was herein filed November 6, 1879,
“ by inserting therein the name of the said Thomas F. Mahan as
“ a defendant, and by inserting in and adding to said complaint,
“ immediately after the subdivision thereof numbered “ 9,” and
“ before the prayer thereof, the following allegation, to-wit: ‘ 10.
“ And plaintiff further avers that the defendant, Thomas F.
“ Mahan, has, or claims to have, some right, title or interest ad-
“ verse to plaintiff, in or to that portion of the said Caledonia lode
“ claim, above described by survey; that said claim of said defen-
“ dant, Mahan, is without foundation or right as against the plain-
“ tiff, but said Mahan persists in the same, and makes said claim,
“ as plaintiff is informed and believes, under the said alleged and
“ pretended location of the said alleged Bobtail lode claim above
“ described, as co-owner with, or claiming under, the same right
“ as defendant, Noonan, as above mentioned; and that said claim
“ of said Mahan casts a cloud upon plaintiff’s title to said portion
“ of said Caledonia lode above described, and plaintiff therefore
“ makes said Mahan a defendant in this action, and asks the same
“ judgment, decree and relief against him as is hereinafter prayed
“ against said defendant, Noonan.’ ”

“ CLAGETT & DIXON,
“ *Attorneys for Plaintiff.*”

No objection was made in the District Court to this mode of amending a pleading, nor was the attention of that court, in any way, called to it.

Upon this appeal the objection for the first time is made. It is alleged to be an irregularity, and also that this amendment to the complaint is an amended complaint, and takes the place of the original—the argument being, that as it is (as assumed) an amended

complaint, and as it does not in and of itself state a cause of action the judgment cannot be sustained.

It is quite true that an amended pleading takes the place of the pleading amended, and that the original drops out of, and ceases to be a part of the record; and it is also true that the mode of making amendments of pleadings recognized by our practice, is by re-writing the pleading, leaving out such allegations and inserting such other allegations as may be desired, so that all the parts of the pleading shall be in one instrument or paper, and be complete in itself.

But this subsequent writing does not purport to be an amended complaint, only an amendment *to* the complaint. At the worst it is but an irregularity which cannot be taken advantage of for the first time upon appeal.

No doubt if the attention of the District Court had been called to it, the regular and proper practice would have been enforced, and the plaintiff compelled to re-write the complaint, inserting the name of Thomas F. Mahan in its proper place. Even in this court, if it was necessary, it would be within the power of the court to cause so technical an objection to be obviated by having both writings incorporated together, as it would involve nothing greater than the performance of some clerical labor by the plaintiff's counsel or other person, and would not in any way affect or change the rights of the parties. But it is not necessary. The complaint, the order, the minute extended upon the journal, the amendment, and the subsequent proceedings make the record complete, as to Mahan, as well as Noonan, and they cannot be heard now to complain of the form of proceedings which do not affect their substantial rights.

We are constrained to this view by the express command of the statute. Section 145, Code of Civil Procedure, is as follows:

“The court shall in every stage of the action, disregard any

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“ error or defect in the pleadings or proceedings which shall not
“ affect the substantial rights of the adverse party; and no judg-
“ ment shall be reversed or affected by reason of such error or de-
“ fect.”

But it is said Mahan has not answered the complaint, and upon the argument it seemed to be cherished as a merit that his counsel had advised him not to answer. It is only his fault if he has not, and he may now be liable to the consequences of a default, but with the agreement on the trial the plaintiff seems to have complied, as the action has been tried and determined, and all proceedings taken, as though he had answered in full. Certainly the adverse party is in no way subject to censure for his not answering. He had the fullest opportunity to do so, and had stipulated to answer at once. More than likely the answer of his co-owner and co-defendant was deemed sufficient, as it not only puts in issue the plaintiff's title, but sets up the title in both Noonan and Mahan—all that Mahan could possibly plead for himself under the proofs. In any event it is not in courts of justice regarded as meritorious for a party to seek advantage by reason of his own *laches*. We might have dismissed this point with much less consideration, as no mention is made of it either in the motion for a new trial or anywhere in the bill of exceptions.

Upon the trial the plaintiff, to prove its corporate existence, offered in evidence in addition to the proofs of user, a copy of its articles of incorporation, certified by the county clerk of the city and county of San Francisco—the place of its principal business—under his seal of office, to which was appended a certificate of the Secretary of State of the State of California, under the great seal of the state; both certificates reciting that it is a copy of the original now on file in their respective offices; and also a similar copy certified to by the Secretary of the Territory as a copy of the articles on file in his office, with the great seal of the territory attached. In connection with these, the laws of the State of Cali-

foria, relating to the organization of incorporations, were produced and offered in evidence without objection, by which laws it appears that such articles are required to be filed—one in the clerk's office of the county in which the principal place of business is situated, and a copy thereof with the Secretary of State. Both of these for the purposes of incorporation may be considered as originals. To the introduction of these certified copies a general objection was interposed, that they were incompetent, irrelevant and immaterial. Upon this appeal it is for the first time objected that they are not properly certified and authenticated, as required by the act of Congress, and that the certificates are signed by the officers named, by deputy.

Without stopping now to determine whether these objections would have been good if made in the court below, but conceding they would have been well taken, the question arises whether such objection taken for the first time upon appeal can be made available.

No rule of practice is better settled than that where an objection to evidence could have been obviated upon the trial, if specifically pointed out, an exception which does not specifically point out such objection will be unavailing upon appeal. Says Mr. Waite, in his work on practice, a text which is supported by all the cases to which our attention has been called, and denied by none:

“Where a specific objection might have availed, a general objection will not be sufficient to raise the point on appeal, especially if the difficulty might have been obviated if such specific objection had been made.”

“Where an exception to evidence is so general in its character as not to indicate the particular ground on which it was made, the exception will be unavailing, unless the character of the objection was such that it could not have been obviated on the trial had it been specifically pointed out.”

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"It is well established that the courts do not favor any unfair or secret mode of raising an objection, and therefore any objection which might have been fairly answered if seasonably made, will be disregarded on appeal, unless specifically taken below:" *Wuites' Prac.*, Vol. 3, p. 206, and Vol. 4, p. 230; *Tooley v. Bacon*, 70 N. Y., 37; *Sevin v. Russel*, 42 id., 251; *Williams v. Sergeant*, 4 id., 481; *Belk v. Meagher*, 14 Otto, 288; *Brady v. Reese*, 51 Cal., 447; *Waterville M. Co. v. B.*, 9 How. Pr., 27; *Knapp v. Schneider*, 24 Wis., 70; *Burton v. Driggs*, 20 Wall., 125; *City of Ripon v. Bettel*, 30 id., 614; *Columbia, Del., Bridge Co. v. Geisse*, 38 N. J. Law, 39; *Merritt v. Seamon*, 6 N. Y., 168; *Coon v. S. & N. R. R.*, 5 id., 492-531.

If the specific objection had been made it would have been easy for the plaintiff to have supplied the certificate required by act of Congress, or to have made other legal proof. The act of Congress providing for this kind of evidence is cumulative, and not intended to supersede the common law rules of evidence.

The evidence was secondary in its character. It was material, relevant and competent to prove a compliance with the law of incorporation of California, and only objectionable because the additional certificate was not appended or other proof made. Nothing is better understood than the rule which requires the objection to secondary evidence to be made specifically upon the ground that it is not the best evidence, or the objection to the introduction of a written instrument in evidence, upon the ground that its execution has not been proven, to be made upon that specific ground to be of avail in a bill of exceptions. These rules are only fair and just to the trial court and to the adverse party.

If the objection goes to the merits, and cannot be obviated, then a general objection may suffice, because in such case the evidence cannot be made available to the party by any subsequent acts. To hold that a party may upon a trial interpose a general objection in no way pointing out the defect of which he complains, and which

could be easily and speedily remedied, and then for the first time in the appellate court raise the merely technical objection that the paper offered was not sufficiently certified, or authenticated, or otherwise proven, would be opening the door to the grossest unfairness, and would be trifling with the administration of the law. If parties desire to avail themselves of such objections they must make them in the trial court, with such particularity and so specifically that this court can see that such trial court has passed upon the very question presented here. Not one case has been called to our attention where a contrary doctrine is sustained.

We have treated this question altogether independent of the proofs which were given of the acts of this plaintiff as a corporation in good faith, and the expenditure of many thousand dollars in the conduct of its business in this territory, together with other facts. These facts were sufficient to establish its *de facto* existence, no proofs being offered to the contrary.

The same views we have expressed with reference to the articles of incorporation, will apply with equal or more force to the questions made with regard to the reading of the depositions of Keithly and Chizum. The objections and exceptions are of the same character as those before given, and now it is urged that it does not appear in the evidence that Keithly was proven to have been out of the county, nor does it appear that appended to the Chizum deposition is a notice of the taking.

In addition to the difficulties in the way of considering this exception already suggested, in the absence of its appearing affirmatively that no such proof was made to the trial court, and that the reading of the deposition was objected to on that specific ground, this court must presume sufficient grounds were laid and sufficient proof was made, to authorize the reading of the depositions.

We cannot, without extending this opinion to a great and useless

length, notice the several instances in which similar technical objections are now sought to be made for the first time in this court, to the admissibility of evidence against which no objection, or no specific objection was made, in the District Court. Suffice it to repeat what we have before in substance said in this case, and held in other cases—parties must point out to the District Court the precise question upon which they seek a ruling, and must be able to put their finger upon and show to this court the very error of which they complain in such ruling. It will not answer to put into the bill a general objection, in no wise calculated to inform the trial court or the adverse party what is the ground of the objection, and then attempt here to spring a trap, and thus unfairly obtain a new trial of the action.

Numerous objections were made to evidence introduced by the plaintiff, of acts relating to the location of these mining claims, and to declarations of the defendants and their grantors prior to the 28th day of February, 1877, the date on which, by the cession of the Black Hills by the Sioux Indians, the lands in controversy became open to exploration and purchase.

This court has before held that no rights could be acquired to any lands in the Black Hills prior to the 28th of February, 1877, by reason of the existence, until that time, of the Sioux Indian reservation covering that part of the territory: *Uhlig v. Garrison*, [2 Dak., 71]; *French v. Lancaster*, [2 Dak., 276,] and therefore if the plaintiff's rights rested upon acts of location done prior to such date, these objections would present the question squarely; and, following the former decisions, we would be necessarily compelled to hold the objections well taken.

The right of possession to a quartz mining claim depends, after a discovery of the vein within the limits of the claim, upon the performance of certain acts of location, and a continuing compliance with the laws of Congress, and with the local laws, rules and regulations not inconsistent with such laws of Congress.

Such acts, performed while the inhibition of the treaty with the Indians remained in force, were of no avail; but a party in possession on the 28th day of February, 1877, with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, could by manifesting his adoption of these facts, and subsequently causing a proper record to be made and performing the amount of labor, or making the improvements necessary to hold the claim, date his rights from that day; and such location and subsequent labor and improvements would give him the right to the possession from that day thereafter.

This case was tried before the decision in *French v. Lancaster*, and before it was known what views this court would entertain as to the validity of a mining location made while the reservation still covered these lands, and by consent both parties to the controversy adduced evidence of acts and declarations occurring prior to February 28, 1877, as well as of facts existing on that day and occurring thereafter, each reserving the right to raise the question of the competency of such evidence by exceptions to be incorporated in the bill if they desired. The cause was tried to the court, and the findings distinctly, clearly and fully discriminate between acts done before, and those done after said date, and those facts which on that day existed. So that, by eliminating and striking from the transcript all the evidence and all the findings having reference to matters occurring prior to such date, the findings abundantly support the judgment in plaintiff's favor, and the evidence clearly and fully supports and authorizes the findings. The defendants are therefore in no wise prejudiced by such evidence or such findings as are objected or excepted to, for the reason stated.

In a trial to the court, findings being made, evidence wholly immaterial which does not enter into, and could have no influence upon the findings, which are the basis of the judgment, and upon

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which it rests, does not prejudice the defeated party, and the admission of such evidence is not error for which a judgment will be reversed.

Immaterial findings which are not the basis of the judgment, other sufficient findings appearing in the record, will not vitiate the judgment or cause its reversal. This question in this case is the precise question which was involved in *Golden Terra Mining Co. v. Smith, administrator, etc.*, decided in this court. In that case the court held that findings of acts of location of a mining claim done prior to the 28th of February, 1877, and the admission of evidence of such acts, did not prejudice the plaintiff and was not a ground for reversal; the findings in that case, as in this, making a clear distinction between facts occurring before and after that date.

In the case of *French v. Lancaster*, which is cited by defendants as sustaining their view, the trial was to a jury, and a general verdict was rendered. Therefore it was impossible in that case to make the distinction made in this and the *Golden Terra* case, as it was not possible to determine what portion of the evidence entered into and aided in making up such general verdict. These cases are readily distinguishable.

Again, in the case at bar, both parties in their pleadings claim by reason of locations made before, and relocations made after, February 28, and the evidence was directed to such separate and distinct issues, so there could be no confusion, and no room for prejudicing the defendants' rights by receiving such evidence.

We follow the decision in the case of *Golden Terra Mining Co. v. Smith* in this, and hold no error prejudicial to the defendants, resulted from the introduction of the evidence in question.

The remaining questions are properly grouped under the allegation of the defendants, that the findings are not supported by the evidence. The rule, which this court has several times announced

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as binding upon it, precludes us from trying the cause anew. Under the practice act of the territory now in force, this court in this case is empowered to correct the errors occurring in the District Court, but cannot try the case anew. The evidence was taken orally, and comes here by bill of exceptions. We can only examine it for the purpose of considering the exceptions, and among them the exceptions to the decision upon the ground of the insufficiency of the evidence to sustain it. Therefore we are only to look into the evidence, upon these exceptions now being considered, to ascertain whether there is a substantial conflict in the evidence, and whether the material findings are supported by sufficient and substantial evidence. If the findings are thus supported we cannot say the District Court has, in making them, erred. We cannot weigh the evidence and determine its preponderance between the parties. That is the province of the District Court. There the demeanor of the witnesses, the manner of testifying, and many almost intangible circumstances can be observed and appear, which aid the trier to determine the credibility of the witnesses and the weight to be given their testimony. Here we have no such opportunity.

This cause took some four weeks to try. The abstract contains nearly four hundred printed pages of testimony abbreviated. Sufficient of it has been read upon the argument in this court, during the five days devoted to it, to make it entirely clear that there was great conflict of evidence, and that the material findings are all fully sustained by the evidence, and therefore the exceptions to the decision for insufficiency of the evidence to sustain it, are not well founded.

No other questions of sufficient importance to require attention in this opinion are made. The judgment of the District Court is,

AFFIRMED.

All of the Justices concurring.

Territory ex rel. Peterson v. Hauxhurst.

TERRITORY EX REL. PETERSON V. HAUXHURST.

1. **QUO WARRANTO: FORM ABOLISHED: JURISDICTION AND POWER OF COURT NOT CHANGED.** In actions to attain remedies formerly reached by the writ of quo warranto and informations in the nature of quo warranto, the old form of the proceedings is abolished, but the jurisdiction and power of the courts and the right to reach through them the remedies which that writ or information once afforded, are not touched or changed by the provisions of the Code.
2. **SAME: RULES OF EVIDENCE: PRESUMPTIONS: LAW AND FACT.** The position of the defendant, the rules of evidence and the presumptions of law and fact are the same as in the proceeding by writ or information, for which the remedy by action was substituted.
3. **PLEADING: TITLE OF ACTION.** The title to the complaint is in these words: "The Territory of Dakota ex rel. Peter O. Peterson, plaintiffs, v. James Hauxhurst, defendant." Held, the proper form in which to entitle the action.
4. **SAME: ALLEGATIONS OF COMPLAINT: SUFFICIENT TO MAKE A PARTY PLAINTIFF.** The allegations of the complaint being: "Peter O. Peterson, one of the 'above named plaintiffs alleges,' etc., etc., 'wherefore plaintiffs allege that 'plaintiff, Peter O. Peterson,' etc.: Held, that the relator, Peterson, was made a party plaintiff by the allegations in the body of the complaint.
5. **SAME: COMPLAINT MUST SHOW RELATOR ENTITLED TO OFFICE.** When the action is not brought by the District Attorney in the name of the Territory, upon his own information, to oust a person from a public office illegally held, but by a relator claiming to be one of the parties plaintiff and to have an interest in the question, it must appear from the facts alleged in the complaint that the relator is entitled to the office in controversy.
6. **COMPLAINT: SUFFICIENCY OF: ESSENTIAL ALLEGATIONS: FORM GIVEN.** The complaint showing that plaintiff received a greater number of legal votes than defendant, and was entitled to the office, being obliged to institute legal proceedings to obtain possession thereof, was sufficient without an allegation of demand of possession of the office or an allegation of qualification therefor. Form of complaint given.
7. **REGISTER OF DEEDS: DOES NOT HOLD OVER: DISTINCTION: DEMAND.** A register of deeds does not hold over his term "until his successor shall be elected and qualified," as is the case with some officials, and the incumbent is a usurper if he attempts to hold over; his possession is unlawful,

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without color of right, and no previous demand of the office is necessary to maintain an action to oust him.

Appeal from the District Court of Brookings County.

Appeal from an order overruling demurrer to the complaint.

Winsor & Swezey, for defendant and appellant. Points and authorities in brief:

The case is one contemplated in section 535, Code of Civil Procedure, brought on the information of a person having an interest in the question, whose name should be joined with the Territory as plaintiff. An inspection of the complaint shows this was not done. There is no joining of the Territory and the relator in the title of the cause or in the body of the complaint. There is clearly a defect of parties plaintiff: New York Code, Sec. 434; *The People ex rel. Crane, and Crane, plaintiffs, v. Ryder*, 12 N. Y., 433; *People ex rel. v. Fairchild*, 67 N. Y., 334; *State ex rel. v. Palmer*, 24 Wis., 63; *State ex rel. v. Douseman*, 28 Wis., 541; *People ex rel. v. Pease*, 25 How. Pr., 495, affirmed in 27 N. Y., 45; *People ex rel. v. Hall*, 80 N. Y., 117.

Inasmuch as the complaint is, at most, the complaint of Peterson only, he has the affirmative and must make out a better title than the one he assails. As against the sovereign the *onus* would be upon defendant. Not so here. The ordinary rule applies. The burden is on the plaintiff: High Ex. Leg. Rem., Secs. 712-13; *State v. Palmer*, 24 Wis., 63; *People v. Perley*, 80 N. Y., 624. The distinction is in favor of the sovereign only. Authorities *supra*.

A private party can have relief against a public officer acting under color of office, only after a demand and refusal to perform the act or restore the thing demanded: High Ex. Leg. Rem., Secs. 13 and 14; *R. R. Co. v. Supervisors*, 37 Cal., 354; *Price*

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v. Riverside Co., 56 Cal., 431; *Supervisors v. Semler*, 41 Wis., 374. The question has frequently arisen in mandamus cases: 2 Dill., Mun. Corp., 696.

J. W. Carter, District Attorney, and *R. A. Murray*, for plaintiffs and respondents.

Code Civil Procedure, Secs. 532, 534, 535 and 536. We have set forth the name of Peter O. Peterson, who is alleged to be entitled to the office in controversy, in the title of the action. This satisfies the statute: Bliss Code Pleading, Sec. 145. The words, "*ex rel.*," in the title, merely distinguish between the two plaintiffs: *Holton v. Parker*, 13 Minn., 383; *Gould v. Glass*, 19 Barb., 179. Peterson is also made a party plaintiff by the allegations in the body of the complaint.

The rule of pleading is the same in this as any other civil action: Brightly on Elections, p. 302; *State v. Wessmore*, 14 Wis., 115; High on Ex. Leg. Rem., 710. The complaint is sufficient: *Carpenter's Case*, 2 Parsons, 537; High Ex. Leg. Rcm., 627, 713, 722. A demurrer will not lie to the complaint, even though Peterson be not entitled to the office: High Leg. Rem., Secs. 712, 713; *State v. Palmer*, 24 Wis., 63. Should be by special demurrer: *People v. Woodbury*, 14 Cal., 43. The demurrer admits every fact well pleaded: *State v. Beecher*, 15 Ohio, 723; *State v. Lean*, 9 Wis., 279. Defendant must show on the face of his plea that he has a valid title to the office: High, Sec. 716. If the demurrer is bad judgment of ouster will follow: Id., 719, 759; *State v. Douseman*, 28 Wis., 541.

The complaint shows facts sufficient to have changed the declared result of the election: Brightly on Elections, 320, 334, 467; 2 Parsons, 537. Our statute is remedial and must be liberally construed: High, Secs. 622, 624. At all stages of the proceedings trivial defects are to be disregarded.

KIDDER, J.—This action was predicated upon chapter 26 of the Code of Civil Procedure, section 535, to determine the title to the office of register of deeds of the county of Brookings, which is as follows: “When an action shall be brought by the District Attorney by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the territory as plaintiff.”

The ancient writ of *quo warranto* was a writ of right for the King, against one who usurps any office, franchise, or liberty, to inquire by what authority he supports his claim in order to determine the right: 3 Bl., 262.

“The remedies formerly attainable by writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* may be obtained by civil action under the provision of this chapter:” Sec. 531.

It is only the *form* of the proceeding that is abolished. The jurisdiction and power of the courts are not touched by that section, even if they could be by legislation; nor the right to seek and reach through them all the remedy which that writ or information once afforded. The position of the defendant, the rules of evidence and the presumptions of law and fact are the same as in proceeding by writ or information, for which the remedy by action was substituted.

This action was brought by the District Attorney of the 4th Judicial District, by leave of the court, to oust James Hauxhurst, the defendant and appellant, from said office, on the petition of Peter O. Peterson, one of the plaintiffs and respondents, and to put said Peterson in possession of the same.

The defendant demurred to the complaint upon two grounds, viz: *First*, a defect of parties plaintiff. *Second*, no cause of

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action is stated in the complaint. The demurrer was overruled, and the defendant electing to stand by the demurrer, judgment was entered against him, from which this appeal was taken.

1. It was conceded on the part of the defendant upon the argument, that he did not demur "to the *title* of the cause, but to the "complaint itself and allegations thereof."

To ascertain whether the name of the plaintiff, Peterson, was joined with the territory as a party in compliance with the statute, we must have recourse to the record.

The title to the complaint is in these words: "The Territory "of Dakota ex rel. Peter O. Peterson, *plaintiffs*, v. James Hauxhurst, defendant." (The italicism is mine.)

The first sentence of the complaint avers, that "Peter O. Peterson, *one of the above named plaintiffs*, respectfully alleges and petitions, * * *: 1. That on the 2nd day of November, " * * *. 2. That on said 2nd day * * *. 3. That prior "to * * *. 4. That at the election * * *. 5. That "at the election so called * * *. 6. That all of the said "judges * * *. 7. That on the 17th day of November " * * *. 8. That heretofore, to-wit, on the first Monday of " * * *. 9. Wherefore *plaintiffs* allege that plaintiff, Peter "O. Peterson, is rightfully entitled to said office * * *. 10. "Wherefore *plaintiffs* demand judgment * * *, and that the "defendant be required to surrender the office in controversy" to the plaintiff, Peterson, etc.

The foregoing allegations of the plaintiffs were made through one of them--through him who had "an interest in the question," and knew the facts that he desired to set out. Then follow the conclusions of law.

From which, does it appear that the relator is made a party plaintiff? In the case *The People ex rel. Crane, and said Crane v. Ryder*, 12 N. Y., 433, cited by the learned counsel of the defen-

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dant, the same points were made on demurrer to the complaint that are raised here; and on the first point that there was a defect of parties plaintiff, the court say: "It is not material in this case "to inquire whether a defendant may demur for a misjoinder of "plaintiffs, if the complaint states facts showing that Crane is "entitled to the office; for the Code requires that where an action "of this kind is brought by the Attorney General, on the relation "or information of a person having an 'interest in the question,' "that the name of such person shall be joined with the people as "plaintiff. If, therefore, the complaint does show that Crane had "an interest in the question,' he being the relator, was properly "and necessarily made a party plaintiff, and the inquiry, whether "a demurrer will lie for a misjoinder of plaintiffs, does not arise." This case is not analogous to the one at bar. It decides that Crane, the relator, *having an interest in the question was properly made a party*, and the question whether a demurrer will lie for a misjoinder of plaintiffs, *did not arise*.

I have examined the cases in 28 Wisconsin, 541, and 24 id., 63, and other cases cited by defendant's counsel, which are authorities in point only so far as the *title* is concerned, *i. e.*, *The Territory of Dakota ex rel. John Doe and John Doe v. Richard Roe* is frequently employed without objection, and, no doubt, for the same reason stated in 12 N. Y., *supra*. And on a further examination of cases not cited on the argument, I find very many entitled the same as the one at bar—no exceptions appearing to have been taken thereto—so I have no hesitancy in declaring that the latter mode is the *rule* for entitling such cases, and the former the *exception*. But as the counsel for defendant makes no point as to the *title*, I will introduce *The people ex rel. Demarest et al. v. Fairchild*, 67 N. Y., 334, cited in his brief, which is not only a parallel case as to the *title*, but as to the *allegations* in the complaint, stated as follows: "The relators allege that they were duly elected aldermen and assistant alderman of the city of New York," etc.

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The allegations in the complaint we are now considering are thus: "Peter O. Peterson, one of the above named plaintiffs, respectfully alleges," etc. Although there does not appear to have been a demurrer interposed in the case of *People v. Demarest* for want of parties plaintiff—for which omission I make no attempt to criticise the distinguished counsel for the appellant in that case—yet we can perceive that the defect is more bald in that case, for the pleader does not state that the relators are "*three of the plaintiffs*," nor does it set up the "people" as "plaintiffs."

The Code, page 529, section 111, reads: "The complaint shall contain: 1. The title of the cause * * * *and the names of the parties to the action.*" *Vide*, also, Bliss on Pleading, Sec. 145; 13 Minn., 383, *Holton v. Parker*.

We are of opinion that the statute has been complied with in stating the title to this action; and also that the relator, Peterson, was made a party plaintiff by the allegations in the body of the complaint.

2. Does the complaint state facts sufficient to constitute a cause of action?

The Code requires that the complaint contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." Sec. 111, Sub. Div. 2. This rule is substantially as it existed prior to its enactment in actions at law. Whatever circumstances are necessary to constitute the cause of complaint or the ground of defense, must be stated in the pleadings, and all beyond is surplusage; *facts* only are to be stated and not arguments or inferences, or matter of law, in which respect the pleadings at law appear to differ materially from those in equity: 1 Ch. Pl., 245. He says, on page 266, it is a most important principle of the law of pleading, that in alleging the fact it is unnecessary to state such circumstances as merely tend to prove the truth of it. The dry allegation of the facts, without

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detailing a variety of minute circumstances which constitute the evidence of it, will suffice. The object of the pleadings is to arrive at a specific issue upon a given and material fact; and this is attained, although the evidence of such fact to be laid before the jury be not specifically developed in the pleadings.

It is a compliance with the Code and safe to state the facts constituting the cause of action substantially in the same manner as they were stated in the old system in a *special* count. By that system the legal issuable facts were to be stated, and the evidence by which those facts were to be established was to be brought forward on the trial. This position will not embrace what were known as the common counts. It has been supposed that a wider latitude should be allowed in equity pleading, and that evidence may, to some extent, be incorporated in the statement. The rule of the Code is broad enough for all cases, and it permits a statement of facts only as contradistinguished from the evidence which is to establish those facts. But in an equity case the facts may be more numerous, more complicated, more involved; and the pleader may state all the facts, in a legal and concise form, which constitute the cause of action and entitle him to relief. The rule touching the statement of facts is the same in all cases, and the rules by which the sufficiency of the pleadings is to be determined are prescribed by the Code.

“The Code establishes the law of this territory respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice.” Sec. 3.

Again, “The court shall, in every stage of action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.” Sec. 145.

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An action of this kind can be brought by any District Attorney, in the name of the territory, upon his *own* information, to oust a person therefrom, when he shall usurp, intrude into, or unlawfully hold any public office: Sec. 534. But such is not this case. In this action—the relator claiming to be one of the parties plaintiff, and to have an interest in the question,—it must appear from the alleged facts that he is entitled to the office.

It is insisted that the complaint is “fatally defective in not alleging any *qualification*” on the part of the relator “for the office, and in not alleging any *demand* for the office.” We will examine its allegations:

1st. The complaint alleges the political existence of Brookings county and its proper organization as a political corporation.

2nd. The holding of an election therein to elect a register of deeds of said county, in November, A. D. 1880.

3rd. That the defendant, Hauxhurst, and the plaintiff, Peter O. Peterson, were rival candidates at that election for the office of register of deeds of said county, and that Peterson was eligible to said office.

4th. That at said election there were 929 legal votes cast for said office of register of deeds, and no more—of which number of votes Peterson received 537, and Hauxhurst 392, thus making Peterson’s majority over Hauxhurst to be 145.

5th. That all the votes cast at said election in the 16 precincts of said county were duly returned unto the proper board, whose duty it was to canvass said votes; that this board of canvassers duly met to canvass, and did pretend to canvass said votes; that defendant, Hauxhurst, was the chairman of said board; that he and the other members of said board threw out the votes of several precincts, and changed the votes cast in one of said precincts, and refused to canvass the votes cast in certain other precincts, and which votes Hauxhurst had previously concealed, and refused to

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present them to said board; that by this means he managed to count Peterson out and himself into said office; and said board, upon such false and dishonest canvass, made and delivered to Hauxhurst a certificate that he was at said election elected register of deeds of said county by a majority of 8 votes.

That being in possession of said office of register of deeds, under his said false and fraudulent certificate, Hauxhurst qualified for said office, and then and thereby unlawfully intruded himself into, and ever since has so held said office, and still usurps, etc. All the facts respecting these matters are carefully detailed and set forth in the complaint; also that Hauxhurst refused to make and deliver to said Peterson a certificate of his election to said office. And lastly, that the plaintiff, Peterson, is entitled to said office by virtue of his said election thereto, and judgment is demanded accordingly.

The complaint would have appeared more "concise" if much of the matter contained therein had been left out, but such matter can be treated as surplusage. The demurrer, however, admits every fact well pleaded; that is, it admits the whole of the complaint according to its *legal effect*.

The prominent question is, did the relator at said election receive a greater number of legal votes than did the defendant? The demurrer, besides other admissions, admits that he did. Then he is entitled to be *qualified*, and by due course of judicial proceedings can be put into the possession of the office; and it is a matter of no consequence whether he qualifies for the position before or after the event of such proceedings. But in this case the defendant *refused* to make and deliver to him a certificate of his election. Therefore he was obliged to take legal proceedings in order that he might obtain a mandate that would give him the possession of the office without the formality of obtaining the official evidence which had been refused him.

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Relative to the question of *demand*, the counsel for the defendant cites *R. R. Co. v. Supervisors*, 37 Cal., 354, to which, sections 13 and 41, in High on Ex. Rem., also cited by him, refer. This was an action for a writ of mandate to compel a board of supervisors to subscribe to the capital stock of the plaintiff, and to issue to said corporation the bonds of the county in payment of the subscription, in pursuance of a special act of the Legislature, by which it was the duty of the plaintiff to tender its books and request the subscription. Also, *Price v. Riverside Co.*, 56 Cal., 431, which was mandamus to compel the defendant to furnish water in accordance with its articles of incorporation. And, also, *Supervisors v. Semler*, 41 Wis., 374, which was an action on a bond of a county treasurer. The complaint averred that on, etc., he became and was a confessed public defaulter in said office. The court held, on demurrer, that this is not equivalent to an averment, that he had failed, on lawful demand, to pay over the public funds in his hands; but the *facts* which render him a defaulter should be alleged. It is further alleged that the board of county supervisors afterwards, "duly filled the vacancy caused by such defalcation," by appointing one Weimer as treasurer of said county; that Weimer duly qualified and entered upon the office; and that defendant refused to pay over the county funds in his hands to Weimer upon demand of the latter. The court held, that as no authority is shown in the board to appoint Weimer treasurer, the complaint fails to show any lawful demand upon the defendant for the funds in his hands, and therefore fails to show any breach of his bond. Neither of which is pertinent to the point in controversy.

I will here submit for the consideration of the profession, a California *form* for a complaint in a case like the one at bar. See 2 Estee's Pleadings and Forms, Second Edition, p. 308, No. 532:

(*Title of the Case.*)

"The people of the State of California, by E. F., their Attorney

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"General, upon the information and complaint of said A. B.,
 "complain of the said defendant, and allege:

"I. That on the _____ day of _____, 188—, at _____, an elec-
 "tion was duly held in the _____ (precinct, district, or county,) of
 "this state, for the office of (here designate the office) for the term
 "of _____ years, from the _____ day of _____, 188—.

"II. That at the said election one _____ received the greatest
 "number of legal votes for the said office.

"III. That on the _____ day of _____, 188—, the defendant
 "usurped the said office, and has ever since withheld the same from
 "the said _____.

"Wherefore the plaintiff demands judgment:

"1. That the defendant is not entitled to the said office, and
 "that he be ousted therefrom.

"2. That the said _____ is entitled to said office, and that he
 "be put in the possession of the same."

See, also, a New York *form*, in 5 Wait's Practice, p. 622,—for
 the same cause, similar to Estee's,—and in neither of which is there
 an averment that the plaintiffs "*demand*ed of the said defendant
 the possession of the said office," or that he was qualified to enter
 upon its duties. These forms, to say the least, have the merit of
 being "plain and concise."

We must not be unmindful of the *fact* that a register of deeds
 does not hold over his term "until his successor shall be elected
 and *qualified*," as is the case with some officials. He is elected
 "every two years." Code, p. 42, Sec. 15. His term expires by
 limitation at the expiration of two years, and his successor may
 commence the next day after his term expires. Hence, the incum-
 bent is *usurping the office*, if he attempts to hold over if not legally
 elected. He has taken possession of it *unlawfully*, without color
 of right, and likening it to taking possession of personal property
tortiously, no previous demand of the office is necessary to main-
 tain the action. The law might be different, if, by the statute, the
 incumbent could hold the office until his successor "shall be elected
 and qualified." But such is not the question I am discussing.

In a case wherein an officer might be removed by the proper

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authority it would seem to be proper that the person appointed to fill his place, after filing his official oath and bond, showing himself *qualified* for the position, should demand of the incumbent the possession of the office before he could be entitled to his action, for the reason that he is in the possession of the office and has color of right thereto; and before he can be ousted therefrom, he should have due notice of the appointment and qualification of his successor. But such cases are *obiter dicta*.

In our judgment the allegations of the complaint are legally sufficient. The demurrer was properly overruled, and the judgment of the court below is

AFFIRMED.

All the Justices concurring.

NORTHERN PACIFIC R. R. Co. v. PERONTO.

1. NORTHERN PACIFIC LAND GRANT: NOT CONDITIONAL BUT ABSOLUTE: FAILURE TO PERFORM: NOT AFFECT TILL FORFEITURE DECLARED The act of Congress of July 2, 1864, granting lands to the Northern Pacific Railroad Company, in aid of its road, was a grant in praesenti and vested all the title the United States then had, subject to the conditions subsequent to be performed by the company, there being no condition that the lands should revert to the grantor in case of a failure to perform the conditions by the grantee. Such title would be unaffected by a failure to perform such conditions, until the United States should enforce a forfeiture.
2. SAME: NO RIGHTS ACQUIRED BY SETTLER. This act is in the nature of an executory contract. Both parties to it had an interest in its performance; both mutually agreed to perform certain acts; it operated upon land to which the United States had not full title, but to which full title was to be acquired, and when acquired such lands were withheld from sale, entry or pre-emption for the benefit of said railroad, so that no person could get any rights thereto as a settler or pre-emptor.
3. SAME: LANDS NEVER OPENED TO SETTLEMENT: NO PRE-EMPTION RIGHTS. The

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passage of the act of 1864, granting land to this railroad company in words of present grant, and providing that the odd numbered sections should not be for sale or entry after the survey of the same: Held, that no person settling and making improvements upon the odd sections, could get any rights as a settler or pre-emptor as against the United States or the railroad company, either under section 2281 of the United States, or the provisions of this act, such lands never having been subject to sale or pre-emption.

4. SAME: SETTLER HAD ACTUAL NOTICE OF LINE OF ROAD: CANNOT OBJECT THAT PLAT OF LINE WAS NOT FILED. Held further, that the defendant having settled upon the land in question, after the passage of the act, while it was Indian territory, near the line of the road, witnessing the construction of the track, had actual knowledge of the definite line of said road, he cannot now object that notice was not sooner given, by the filing of the plat of such definite line in the office of the Commissioner of the General Land Office, nor be regarded as a bona fide settler, or pre-emptor, in any sense.

Appeal from the District Court of Cass County.

The facts appear in the opinion.

C. W. Buttz and Twomey & Francis, for defendant and appellant. Points and authorities cited:

It is conceded that on July 2, 1864, the lands in controversy formed part of the country in the possession and occupancy of the Wahpeton and Sisseton bands of Indians. This continued until May 2, 1873, when the Indian title was extinguished and their rights ceded to the United States. By the treaty proclaimed May 2, 1867, the Indian bands aforesaid ceded to the government "the right to construct wagon roads, railroads, mail stations, telegraph lines, * * * over any route or routes that may be selected by authority of the government:" U. S. Stats. at Large, Vol. 15, p. 505.

That the words used in the statute import a grant *in presenti*, is unquestionable: *Leavenworth R. R. Co. v. U. S.*, 2 Otto, 741; *Hall v. Russell*, 11 Otto, 509; *Missouri R. R. Co. v. Kan. Pac. R. R. Co.*, 7 Otto, 496; *R. R. Co. v. Baldwin*, 13 id., 428.

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The land in controversy was excepted from the operation of this grant, as it is only of lands to which the United States have "full title," and free from *other claims or rights*. Indian title not being extinguished, full title was not in the United States, and title did not pass to plaintiff by this grant: *Wolsey v. Chapman*, 11 Otto, 770. Nothing passes to the plaintiff but what is granted in clear and explicit terms: *Rice v. R. R. Co.*, 1 Black, 380; *Leavenworth R. R. Co. v. United States*, 2 Otto, 740.

The law will not presume that Congress granted lands to which other parties had pre-existing rights: *Broder v. Water Co.* 101 U. S., 274; 2 Otto, 773.

The right of the Indians to occupy the land was as sacred as that of the government to the fee, and was unlimited: *Beecher v. Weatherby*, 5 Otto, 526; *United States v. Cook*, 19 Wall., 591; *The New York Indians*, 5 Wall., 771; *Johnson v. McIntosh*, 8 Wheat., 574; *Worcester v. Georgia*, 6 Peters, 580; *Newhall v. Sanger*, 2 Otto, 762-3; *Cherokee Nation v. Georgia*, 5 Peters, 1.

Congress adopted the policy of keeping the public lands open to occupancy and pre-emption, notwithstanding any grants it might make, and if any sections settled upon were found to fall within the limits of the grant, other lands should be selected in their place: *Railroad v. Baldwin*, 13 Otto, 429. The plaintiff could not acquire any rights in the lands in question until the line of its road was definitely fixed, and the plat thereof filed in the office of the Commissioner of the General Land Office. This was not done until May 26, 1873. Prior to this plaintiff had no title: *R. Co. v. Baldwin*, 13 Otto, 428; *Spaulding v. Martin*, 11 Wis., 274; *Terry v. Megerly*, 24 Cal., 624; *Copps Land Owner*, Vol. 9, p. 82. That provision of the statute relating to the extinguishment of Indian title, applies exclusively to *right of way*, stations, etc.

The defendant being a qualified pre-emptor, was the land in con-

troversy subject to pre-emption prior to the fixing the definite location of the road and filing the plat? Upon extinguishment of the Indian title, May 2, 1873, the land was open to pre-emption: U. S. Rev. Stats., Sec. 2257. The moment the Indian title was extinguished defendant's rights as a settler attached: *Leavenworth R. R. Co. v. U. S.*, 2 Otto, 739; *Shepley et al. v. Cowan et al.*, 1 Otto, 331-7; *Wirth v. Branson*, 8 Otto, 121; *Union Pac. R. Co. v. Watts*, 2 Dill., 310; *Cox v. S. P. R. R. Co.*, Land Office Rep., 1879, p. 92; *id.*, 1877, p. 79.

Defendant's settlement gives him no right against the government, but protects him from intrusion or purchase by others, and gives him the preference to purchase: *Frisbie v. Whitney*, 9 Wall., 195; *Little v. Arkansas*, 9 How., 333; *Wirth v. Branson*, 8 Otto, 118.

The plat of definite location was not filed till May 26, 1873, twenty-four days after the Indian title was extinguished, and in this time defendant's rights had attached, and the refusal of the register and receiver to receive his filing could not prejudice his rights: *Shepley v. Cowan*, 1 Otto, 338; *Frisbie v. Whitney*, 9 Wall., 195-6; *Stark v. Baldwin*, 7 Neb., 114; Lewis' Leading Cases on Land Laws, p. 209.

The identity of the land granted was mathematically ascertained when the plat of definite location was filed: *Grinnell v. Railroad Co.*, 13 Otto, 742. Plaintiff claims the lands were withdrawn from pre-emption before any rights could attach. No legislative authority is found for such withdrawal, unless it be in section 6, act of July 2, 1864, which provides that, "the odd sections of land *hereby granted* shall not be liable to sale or entry or pre-emption *before or after they are surveyed, except as provided by this act*" * * *. This section is to be construed in connection with section 3 of the same act, in order to arrive at a full understanding of its provisions. The lands *hereby granted*, to which the United

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States have *full title*, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the road is definitely fixed and plat thereof filed in the office of the Commissioner of the General Land Office. The words, "public lands are used in federal legislation, to describe such as are subject to sale or disposal under the *general law*. These lands were not within the terms of the grant, and any patent or other evidence of title issued therefor was void: *Morton v. Nebraska*, 21 Wall., 675; *Rerehart v. Phelps*, 6 Wall., 160; *Minter v. Crommelin*, 18 How., 88; *Stark v. Mather*, 12 Am. Dec., 565.

Where department officers have erred in the construction of the law, a court of equity ought to relieve a party thereby deprived of a substantial right: *Sampson v. Smiley*, 13 Wall., 91; *Minnesota v. Batchelder*, 1 Wall., 109; *Ferguson v. McLaughlin*, 6 Otto, 174-535-330; *Cunningham v. Ashley*, 14 How., 537; *Barnard heirs v. Ashley heirs et al.*, 18 How., 43; *Garland v. Wynn*, 20 How., 6; *Lyle et al. v. Arkansas et al.*, 22 How., 193. The judgment of the District Court should be reversed.

W. P. Clough, for plaintiff and respondent.

No more than one question is really in this case. Did lands, the Indian right to occupancy of which had not been extinguished at the date of the company's grant, pass by that grant? If such lands did pass by that grant, the lands here in dispute were clearly not subject to pre-emption. That grant must be construed in view of the condition of things existing at the time Congress made it. At that time, it is a matter of public history that the greater part of the country through which the Northern Pacific railroad passes was Indian country. The so-called Indian title had been extinguished at the extremities of the route; but for most of its length, the line, if located at the date of the grant, would have passed through regions still occupied by savage tribes.

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This grant was, undoubtedly, in the present. Hence, if lands still subject to Indian occupancy were not included in the grant, the grantee took comparatively little under it. But one of the chief things which Congress had in mind when it made this grant, was to avoid such a consequence. At that date no railroad to the Pacific Coast had been completed. The completion of a single one, without the aid of the government credit to an amount sufficient to complete it, was considered impossible, even with an enormous land grant.

The Northern Pacific Company was to have no money subsidy. Congress took pains to expressly declare, in the act making the grant to it, that no such aid should ever be given. The language on this point, is as follows: "*And provided further, That no money shall be drawn from the treasury of the United States to aid in the construction of said Northern Pacific Railroad.*"

On this account there was all the more reason why the land subsidy should be made a reality instead of a mere sham, as it would have been, if lands still subject to the right of Indian occupancy had been excepted out of it. When these things are remembered, the reason of the last clause of section 2 of the company's grant is instantly recognized. That clause is in these words:

"The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operations of *this act, and acquired in the donation to the [road] named in this bill.*"

Congress, by this clause, not only meant to assure to the company the lands to which the Indian title still adhered, but it also meant to assure to it the earliest possible availability of those lands for the purpose to be subserved by the grant. Those purposes were the sale of the lands for production of means to build the road, and their settlement to give the road business when built.

Another evidence of the intent of Congress, is this: The language of this clause assumes, as a matter of course, that the company will acquire lands under the act to which the Indian title has not yet been extinguished. If no such lands were meant to be donated by Congress to the company, the clause has no force. It stands upon the face of the act as a dead excrescence. But the established rules for interpreting statutes will not permit such a thing. Those rules demand that *some force* be given to every clause. Hence, it must be assumed, merely because this clause is in the act, that Congress meant the company to obtain *some* lands of the character therein described. But, if Congress meant *any* of the donations embodied in the act to include such lands, it undoubtedly meant *all* of them to include the same. What is in the clause to show that it applies only to right of way? Had its application been limited to right of way, the language would have been, "all lands falling under the operations of *this section*," instead of "all lands falling under the operations of *this act*."

The rules for construing grants of right of way are no different from those for construing grants of the fee. If, for any reason connected with the *status* of a particular tract of land, it would be excepted out of a grant in fee, it would equally be excepted out of a grant of any estate less than the fee. Hence there is no logic in saying that the clause providing for extinguishment of the Indian title applies to the grant of the right of way, but does not apply to the grant of lands in fee.

It may be further remarked that no case, or even departmental ruling, can be found asserting that lands, the Indian right to occupancy of which yet exists, are, for that reason, inferentially excepted from a grant that would otherwise pass it.

It has always been held by executive departments, as well as by courts, that lands *expressly reserved* by the government for use of the Indians, are by inference reserved out of railroad grants. But;

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while numerous grants have been made of lands yet in occupancy of Indians, such lands have never been treated as excepted from the grant by any branch of the government.

While the lands yet in occupancy of the Wahpeton and Sisseton bands of Indians, lying within the limits of this company's grant, passed to the company, the grant was, of course, subject to that right of occupancy. The company could not get possession of those lands until the government, in pursuance of its express promise, should first procure the surrender of that right of occupancy. But the moment the Indian right was extinguished, the company's right of possession followed its title.

The line of the company's road was definitely fixed and located across the very tract of land in controversy, and actually completed and put into operation, before the middle of the year 1872. Hence, there never was any interval of time between the extinction of the Indian right and the attachment of a complete title in favor of the company. For, assuming the company's grant to have been one in the present, by the completion of the road in accordance therewith, in the year 1872, the company became owner of the fee, subject to the Indian possessory right, and the extinction of that right merely gave the company the liberty to enter upon and enjoy what it already owned.

The fact that the map of definite location was not filed until after the extinguishment of the Indian possessory right is of no consequence. The only purpose of filing such a map is notice; and the actual location and construction of the road gave notice of the location in the most effectual manner.

Two or three other lines of argument might be pursued, which would dispose of Peronto's pretenses as completely as that one traced above. But, since his case must fail for the reasons stated, to show its untenability upon other grounds would be useless.

HUDSON, J.—This action was brought by the plaintiff, the Northern Pacific Railroad Company, to recover the possession of a certain piece of land, situate within the limits of the city of Fargo, occupied by the defendant.

The title relied upon by the plaintiff to maintain the action, is derived from the United States, by virtue of a grant of land to aid in the construction of a railroad and telegraph line by plaintiff from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern route: Act of July 2nd, 1864, Vol. 13, U. S. Statutes at Large, p. 365. In and by said act, after granting right of way, etc., in section one, section 2, provides as follows: * * * * *

“The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act and acquired in the donation to the [road] named in this bill.”

“SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and

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" a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior."

* * * * *

"SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

It has been repeatedly held that by the terms employed in this act, the title in fee in the land vested in the grantee, subject to the right of occupancy by the Indians. It was also subject to the conditions subsequent, imposed by the act. It was an absolute grant but in the nature of a contract by which both parties to it agreed to perform certain acts. If Congress had the power to dispose of the public lands (and this power at this day will hardly be doubted) all the title the United States had was vested in the railroad company, subject to the conditions to be performed on its part. There

is no provision in this act, by which the lands were to revert to the grantor in case of a failure to perform these conditions. The title to the land would be unaffected by such failure until Congress should see fit to enforce a forfeiture. The words used are terms of present grant; but at the time this act was passed, that portion of the grant lying west of the Red River, embracing the land in this contention, was Indian territory, in the possession of the Wahpeton and Sisseton bands of Indians; hence the act provided that the United States should extinguish, as rapidly as consistent with public policy and the welfare of the Indians, their title to all the lands falling under the operation of the act.

It was insisted on the argument by the learned counsel for the defendant, that these lands being in the possession of the Indians, were excepted from the grant because the United States did not have full title within the language of section 3 of the act; that it cannot be presumed that Congress granted land to which others had pre-existing rights. That is very true in case there is nothing to show a different intent; but it is very evident from the provisions of this act, that Congress did intend to grant lands to which the Indians had the right of occupancy; otherwise it would not have provided for the extinguishment of their title. Indeed if no land was granted by this third section, subject to the Indian title of which they had possession, the railroad company get but very little by the grant, and its object, as declared in the act, would be most essentially defeated, for the reason that there was at that time no other than Indian land along the line of this proposed road, in the Territory of Dakota. The following clause in section three is referred to as limiting the grant and supporting the construction of the defense: "Whenever on the line thereof, the United States have full title not reserved," etc., "at the time the line of said road is definitely fixed and a plat thereof filed in the General Land Office;" but it should be borne in mind that this was an executory contract; it was as if Congress had said, when

we get full title to this land, the general route of the road being fixed, it shall vest absolutely in the railroad company. To carry out this agreement, and to get full title it was provided that the Indian title should be extinguished as rapidly as possible, etc., with this intent; and that other claims should not attach, it was provided that as soon as the general route of the road should be fixed, the land should be surveyed and the odd sections should not be liable to sale, pre-emption, etc.; and this in anticipation of the extinguishment of the Indian title. The land was as clearly defined as it could be; clearly it was Indian lands—not that Congress intended to ignore the rights of the Indians, but respecting them, agreed to acquire their rights, of course, in an honorable way. Such, it seems to us, is the fair construction to be given to that clause in the act. This extinguishment was effected by a treaty with the Indians, signed and executed on the 2nd day of May, 1873. On that day the title became perfect in the government, and when the line of said road was definitely fixed by the building of the road and filing the plat thereof in the office of the Commissioner, vested in the grantee. The plaintiff having acquired a complete title and right of possession to this land, is entitled to recover upon that title, unless the defendant can show a prior or better right. This he seeks to do by showing a pre-emption right which, it is alleged, attached to the land prior to the title of the plaintiff. He alleges, that having the qualifications of a pre-emptor, he entered upon the land and attempted to comply with the act of September, 1841, section 2259 of which provides that every person (having certain qualifications) “who has
“made, or hereafter makes, a settlement in person on the public
“lands subject to pre-emption, and who inhabits and improves
“the same, and who has erected or shall erect a dwelling thereon,
“is authorized to enter with the register of the land office for the
“district in which such land lies, by legal subdivisions, any number of acres, not exceeding one hundred and sixty, or a quarter

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“ section of land, to include the residence of such claimant, upon
“ paying to the United States the minimum price of such land.”

It seems not to be disputed that the defendant had the qualifications of a pre-emptor required by this law. And the record shows that on the 5th day of October, 1871, he settled on the land and improved it—built a small dwelling house and continued to reside thereon up to the time this suit was commenced; that the plaintiff at the time of such settlement was at work on its right of way, laying its track across said piece of land so settled upon by defendant within about ten rods of his dwelling; that on the 28th day of July, 1873, the defendant signed, and on August 11th following, presented his declaratory statement to the register and receiver of the land office at Pembina, which was the proper office, declaring his intention to claim the said land as a pre emption, under the said act of Congress, alleging settlement October 5th, 1871. The description of land in said declaratory statement was as follows: The north half of the northwest quarter and the northwest quarter of the northeast quarter and lot 1 of section 7, township 139, range 48, subject to sale at the land office at Pembina, in the Territory of Dakota, containing 150.95 acres. The said line of road traverses this piece of land from east to west. This statement was presented within three months after the township plat was filed in which it was situated. The register and receiver refused to permit the defendant to file said declaratory statement and to pre-empt said land, for the reason, as they stated, that they had been instructed to withhold said land from sale; that the lands therein described were railroad lands. From this refusal of the local land officers the defendant appealed to the Commissioner of the General Land Office. And from the decision of the Commissioner affirming the decision of the local officers, to the Secretary of the Interior, who affirmed the decision of the Commissioner. And the defendant has not at any time taken any other or further steps to secure his rights as a pre-emptor, but in his answer in

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this action alleges that the decision of the Land Department was erroneous and prays that such decision be reversed.

We now come to the principal question involved in this controversy, and upon which it turns—namely, was this land at any time *public land subject to pre-emption*, so that the defendant could acquire any rights as a settler, or a pre-emptor, upon it?

The plaintiff having commenced work on its right of way in 1871, and continued from that time, and having filed a map of the general route of said line from the Red River to the James River and across this land in February, 1872, in the office of the Secretary of the Interior, it became the duty of the President of the United States to cause a survey of the land. This authorized the withholding of the same from sale, entry, or pre-emption, by the officers of the Department of the Interior, as provided in section six of the act. This provision had that effect, without further notice; but it was so formally withheld by notice. Thus the government undertook to perform, and did perform strictly, all that the act provided should be done to secure to the defendant that which it contracted for. This was a mutual contract; the government had an interest in it, and in its performance on the part of the railroad company.

Section three declares that beyond giving aid to the railroad, the purpose was "to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway." It had an interest also in the enhanced value of the public lands in the vicinity of the road. Therefore it was perfectly competent for Congress to provide, (to secure these objects) that the odd sections falling within the operation of the act, be withheld from sale or pre-emption, that the grant might be effective. They were thus set apart from the public domain so that no subsequent act or law of the government could be construed to embrace them, although not specifically excepted. All

that afterwards remained for the United States to do with respect to them, and all that could be done under this compact was to identify the sections by appropriate surveys: *Beecher v. Wetherby*, 5 Otto, 524; *Wilcox v. Jackson*, 13 Peters, 508. After such appropriation the government was not at liberty to sell them, and any other disposition by sale, or otherwise, would be void: *Kessell v. Board of Public Schools*, 18 How., 19; *Chatard v. Pope*, 12 Wheaton, 587. After the filing of the map of the general route and the lands surveyed, the odd sections were not for sale or pre-emption; and when the Indian title was extinguished by the ratification of the treaty between the United States and the tribes then occupying them, the provisions of section six of the act became effective and no pre-emption rights could be acquired thereafter.

It is not claimed that the defendant could acquire any right before, not even to be regarded as a settler, and there was no interval after the extinguishment when these lands were subject to sale, so that no right could attach at any time; hence the status of the defendant did not bring him within section 2281 of the Revised Statute, and constitute him a settler, nor within the provisions of the act of July 2, 1864.

Should there be any doubt in the minds of any as to the lands that were actually withheld by the department, reference is had to the letter of instruction of the Commissioner of the General Land Office, to the local officers. The material part is as follows:

“ Department of the Interior, General Land Office, }
 “ Washington, D. C., March 30, 1872. }

“ *Register and Receiver, Pembina, Dakota Territory:*

“ GENTLEMEN:—I transmit herewith diagram showing the designated route of the Northern Pacific railroad, under act of July 2, 1864, and by direction of the Secretary of the Interior, you are directed to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed odd numbered

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" sections of public lands falling within the limits of forty miles,
 " as designated on this map. * * * * *
 " This order will take effect from the date of its receipt by you.
 " * * * * * (Signed,) W. W. CURTIS,
 " Acting Commissioner."

It is quite immaterial to this action when the plaintiff acquired title to this land, only that it was before this action was brought. There was no strife between the plaintiff and defendant, as contended for by counsel, as to priority of right, because the land was not at any time subject to pre-emption. It is quite true that a person may enter upon public lands not yet subject to entry and make improvements; and if the land is subsequently declared to be open to sale and pre-emption, if his settlement is followed up by the other steps, he may get title, but he takes the risk of its being withheld from sale or appropriated to some other purpose. He acquires no right by his settlement as against the United States. All the right any such settlement would give would be the right to enter the land in preference to another settler coming after, in case the land became open to sale. The question of priority then would be of some importance between two such settlers for entry or pre-emption. The rule of first in time, first in right, would apply: *Frisbie v. Whitney*, 9 Wall., 187; the Yosemite Valley Case, 15 Wall., 77; *Shepley et al. v. Cowan et al.*, 1 Otto, 338.

The government undertook to grant these lands to the railroad company before the defendant or any white man had settled upon them, and it used all the means in its power to make the grant effective and to prevent any person from acquiring rights in them except the railroad company. It never consented by any act of Congress or of the Land Department to sell them to anybody else, but always refused to do so, and it would be marvelous if the defendant should be able to defeat this attempt in spite of all.

Much stress is laid upon the language of section 6 of the act

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granting this land, excepting and protecting the rights of settlers, pre-emptors and others; but it is very clear that *bona fide* settlers and pre-emptors are to be thus protected, which this defendant was not and could not be.

The passage of this act was constructive notice to all the world that this land was appropriated to the purposes of this railroad; that the odd numbered sections would be withheld from sale and pre-emption as soon as the land was surveyed, and the even numbered sections put in the market at \$2.50 per acre when the general route was fixed. The act so declares, and as a matter of fact, this was done long before the Indian title was extinguished. The road was built across the land in question while the defendant was a mere trespasser. These facts all came to the personal knowledge of the defendant who was on the ground. He presented his declaratory statement to the land office at Pembina with the full knowledge that his improvements were on an odd numbered section which was not subject to pre-emption and never had been. In any view we can take of this case, we cannot see that the defendant has any valid claim or right to this land. Judgment of the District Court is,

AFFIRMED.

All the Justices concurring.

THE STAR WAGON CO. v. MATTHIESSEN ET AL.

1. **STATUTE OF LIMITATIONS: AFFECTS REMEDY: GOVERNED BY LEX FORI.** Suits brought to enforce contracts, either in the state where they were made or in the courts of other states, are subject to the remedies of the forum in which the suit is, including that of the statute of limitations.
2. **PRACTICE: REPLY: WHEN NECESSARY.** By the Code of Civil Procedure of this territory, when the answer contains new matter constituting a counter

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claim, a reply is necessary to put in issue such new matter. But unless the new matter set up in the answer constitutes a counter claim, no reply is necessary unless ordered by the court.

3. **PLEA OF PAYMENT: BURDEN OF PROOF.** Where the plea of payment is set up by a defendant the burden is on him to establish such defense by competent proof.
4. **SAME: NO ISSUE.** In this case the statute of limitations had not commenced to run in this territory, and there was no fact in reference to the same to be submitted to the jury.
5. **EVIDENCE: COLLATERAL SECURITY: NOT PAYMENT.** The giving of security, either by mortgage or trust deed, was not a payment of the note, nor is it a defense in an action brought on the note, only so far as the security may have been paid to the holder of the note.
6. **DIRECTING VERDICT: NO EVIDENCE: COURT MAY.** Before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the Judge—not literally whether there is no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. There being no sufficient evidence in this case to warrant a verdict for the defendant upon the issue, it was not error for the Court to direct a verdict for plaintiff.

Appeal from the District Court of Lawrence County.

The facts are stated in the opinion.

Gilbert B. Scofield, for defendants and appellants. Points and authorities in brief:

The motion made by plaintiff for the Court to instruct the jury to find a verdict for plaintiff for the amount claimed in the complaint should have been denied: *Wardell v. Hughes et al.*, 3 Wend., 418; *Clark v. Dutcher*, 9 Cowen, 674; *Graham & W.* on New Trials, Vol. 1, p. 270, *et seq.* The plea of statute of limitations should have been submitted to the jury, it being a question of fact as to the residence of the parties. Where no denial is made this plea is taken as true, and evidence must be adduced to disprove the allegation.

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Van Cise, Wilson & Martin, for plaintiff and respondent.

Where the statute of limitations is set up, the court, in its discretion, on defendant's motion, may require a reply. It is not a counter claim which is taken as admitted unless denied: Code of Civil Proc., Secs. 122 and 137; *Hubbel v. Fowler*, 1 Abb., (N. S.) 1; *Jarvis v. Pike*, 11 id., 398. The statute of limitations is not enacted to extinguish the debt, but to bar the remedy, and the *lex fori* governs: *Sloan v. Waugh*, 18 Iowa, 226; *Leroy v. Crowningshield*, 2 Mason C. C., 467; *Townsend v. Jennison*, 9 How., (U. S.) 467. The burden is on defendants to prove payment. The Court is authorized to direct the jury to find a verdict for a party, when there is no conflict in the evidence and no dispute about the facts, or when there is such a preponderance of evidence on one side that a verdict to the contrary would be set aside as against the evidence: 3 Waits' Prac., 181; Thompson Charging Jury, p. 44; *Chandler v. Von Ræder*, 24 How., (U. S.) 227; *Hæflinger v. Stafford*, 38 Wis., 391; *Shirley v. Vail*, 38 How. Pr., 406; *Merchants' Bank v. State Bank*, 10 Wall., 637; *Improvement Co. v. Munson*, 14 Wall., 488; 29 Wis., 165; 1 Green., (Ia.) 259; id., 494; 1 Cal., 109; 23 Cal., 593; 33 Cal., 111; 4 Ohio St., 628; 18 N. Y., 422; 24 N. Y., 430; 44 N. Y., 577; 54 N. Y., 253; 2 Saw., (C. C.) 500; 3 id., 500; 22 Wall., 116; 93 U. S., 143; 94 U. S., 278; 99 U. S., 676; 100 U. S., 693.

EDGERTON, C. J.—This was an action brought in the First District for Lawrence county by the respondent against the appellants. The complaint alleges that the plaintiff is a corporation duly organized under the laws of Iowa; that at Salt Lake City, Utah, on March 1, 1875, the defendants duly executed their promissory note to the plaintiff, promising to pay the plaintiff \$700, with interest at 1 per cent. per month, on or before nine months after date; that

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no part of the note has been paid, and that there is now due and owing the plaintiff from the defendants on said note, \$700, and interest at 1 per cent. per month, since March 1; 1875.

The answer denies, upon information and belief, that the plaintiff is a corporation. The answer admits the execution of the note but alleges that it has been fully paid; that one of the defendants gave the plaintiff a trust deed to certain property in Salt Lake City of the value of \$1,200, to secure the payment of the note, which defendants are informed and believe has been sold and proceeds applied to the payment of the note to its full amount and interest. The answer further alleges that if said corporation ever existed it has been dissolved. The answer contains the following allegations: "The defendants further say, that the pretended indebtedness upon the promissory note set forth in the complaint, if any was contracted, it was in the city of Salt Lake, in the Territory of Utah, and that by the laws of said territory, the same is barred by the statutes of limitations of said Territory of Utah, and by the laws of the Territory of Dakota; that the said Peter Matthiessen resided in Salt Lake City for more than three years after the said note became due and payable." There was no reply.

After the evidence was all in the Court instructed the jury to return a verdict for the amount of the note and interest. To which the defendants excepted. The jury returned a verdict for the plaintiff for \$1,267. A motion was made by the defendants for a new trial, which was denied, and judgment rendered for the plaintiff in accordance with the verdict of the jury. From which judgment the defendants appeal to this court.

The only questions urged in this court are—*first*, that the court below should have denied the motion of the plaintiff to instruct the jury to find a verdict for the plaintiff; and, *second*, that the plea of the statute of limitations should have been submitted to the jury as a question of fact.

Examining these propositions in the inverse order in which they

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were presented, by the Code of Civil Procedure of this territory, when the answer contains new matter constituting a counter claim, a reply is necessary to put in issue such new matter; but unless the new matter set up in the answer constitutes a counter claim, then no reply is necessary, unless ordered by the court.

This action was commenced within six years from the maturity of the note. It does not appear what the laws of Utah are upon this question, but assuming that by the laws of that territory the limit for bringing actions upon contracts of this kind to be three years, what will be the effect on this action? In *Townsend v. Jennison*, in 9 Howard, p. 420, the Supreme Court of the United States lays down the rule, "that the obligations of the contract upon the parties to it, except in well known cases, are to be expounded by the *lex loci contractus*. Suits brought to enforce contracts, either in the state where they were made, or in the courts of other states, are subject to the remedies of the forum in which the suit is, including that of statutes of limitations."

In reference to the nature of the plea of the statute of limitations, the same court says in *McElmoyle v. Cohen*, 13 Peters, p. 327: "Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy, and consequently that the *lex fori* must prevail."

In the case before us the statute of limitations had not commenced to run in this territory, and there was no fact in reference to the same to be submitted to the jury. The execution of the note was admitted in the pleadings. The evidence showed that plaintiff was an incorporation.

The only remaining question is, whether the Court was justified in directing a verdict for the plaintiff. The burden was upon the defendant to establish his plea of payment by competent proof.

It appears by the evidence that the only payment ever claimed to be made upon the note was that a trust deed upon certain property in Salt Lake City was made by Nicolai C., one of the defendants, to Peter Matthiessen, the other defendant, and by him assigned to the plaintiff as collateral security for this note. The giving of security, either by mortgage or trust deed, was not a payment of the note, nor is it a defense in an action brought on the note, only so far as the security may have been paid to the holder of the note. There is no evidence that this security or any part thereof has ever been paid to the plaintiff or his agent.

There seems to have been an attempt to prove that the property on which the trust deed was given, was turned over to the plaintiff and that the note was to be surrendered. One of the defendants testifies that he went to the plaintiff's agent, one Lowe, at Salt Lake City, and offered to turn over the property to him, and brought the tenant who occupied the property, and told him plaintiff's agent would thereafter collect the rent on the property. But at the very outset the agent told the defendant he did not have the papers; that "*they took them along with them to Cedar Rapids, Iowa.*"

It no where appears that the plaintiff has ever received any rent or otherwise used the property. There is no proof that Lowe professed to have any power to satisfy the debt, or that the same was within scope of his authority. There is no attempt to prove that the plaintiff ever accepted this offer or ever ratified the alleged acts of the agent in reference thereto. We have failed to find any competent evidence to support the plea of payment, or at least not sufficient to warrant a verdict for the defendant upon this issue.

The rule laid down by the Supreme Court of the United States in *Commissions, etc., v. Clark*, reported in 4 Otto, p. 284, seems to be the correct one: "Decided cases may be found where it "is held, that if there is a *scintilla* of evidence in support of a

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“ case, the Judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit: that before the evidence is left to the jury there is or may be in every case a preliminary question for the Judge, not literally whether there is no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.”

Upon the whole case we can see no error in the court below in directing a verdict for the plaintiff. The judgment is,

AFFIRMED.

All the Justices concur.

MOLINE PLOW Co. v. GILBERT ET AL.

1. **EVIDENCE: ADMITTING IMPROPER: NOT AFFECTING VERDICT: NOT GROUND FOR REVERSAL.** The admission of secondary evidence without the proper foundation being laid therefor is not ground for a new trial, when it clearly appears to this court that no injustice has been done, and the verdict would have been the same with or without such evidence.
2. **SAME: WITNESS UNDERSTANDING: NOT COMPETENT EVIDENCE.** A witness cannot testify as to his understanding of the terms of a contract; and the exclusion of such evidence is not error, even when the ground of the objection to the evidence is, that the answer is not responsive to the question asked.
3. **SEMBLE: CHARGING THE JURY: DUTY OF THE COURT.** It is the duty of the court to charge the jury, whether requested or not, upon every point material to the decision of the case, upon which there is evidence, and to charge correctly and fully.
4. **SPECIAL VERDICTS: DIRECTING: IN DISCRETION OF COURT.** The court may, in its discretion, instruct the jury, if they find a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. But when the charge of the court fully covers all the issues in the case, it is not error to refuse to instruct the jury to find specially upon certain issues.

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5. **GUARANTORS: WHAT EXONERATES.** In an action on a contract of guaranty, it is not error to instruct the jury, that if the terms of the agreement, guaranteed by defendants, were altered in any respect without consent of the defendants, in the time of payment, or in the proportionate part payable in the first payment, or in the matter of interest, or if any alteration was made which impaired or suspended plaintiff's remedy against the principal, the defendants would be exonerated; but query, whether shortening the time of payment impairs or suspends the remedies or rights of the creditor against the principal.
6. **VERDICT: EVIDENCE CONFLICTING: COURT WILL NOT DISTURB.** Where there is a substantial conflict of evidence, and the evidence is sufficient to sustain the findings of the jury, the verdict will not be disturbed in this court.

Appeal from the District Court of Minnehaha County.

The opinion states the facts.

Winsor & Swezey, for defendants and appellants. Points and authorities in brief:

The court erred in admitting in evidence the letter-press copy of plaintiff's letter of March 14, 1878, to Gilman, no proper foundation therefor having been laid: *Foot v. Bentley*, 44 N. Y., 166; *Delaney v. Erickson*, 6 N. W. Rep., (Neb.) 600; 73 Ill., 161; 57 Ga., 50.

The court erred in its refusal to submit to the jury certain special issues, and instruct them that in their discretion they might find special verdicts thereon, as requested by defendants. This is an action for the recovery of money only, and the rule of our statute is the same as at common law: Code of Civil Proc., Sec. 261; 1 Burrill's Prac., 242; Tidd's Prac., 897; *Peck v. Snyder*, 13 Mich., 21; *Henderson v. Walker*, 32 id., 68; *Jones v. Ins. Co.*, 61 N. Y., 79; *Schultz v. Cremer*, 13 N. W. Rep., 59; *People v. Antonio*, 27 Cal., 404.

Any alteration in the terms of the contract, without the consent of the guarantor, releases him from his obligation: Civil Code,

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Sec., 1666; Brandt on Guar. and S., Secs. 330, 338, 345-7; *Leeds v. Dunn*, 10 N. Y., 469. The evidence is insufficient to sustain the verdict, because the proofs do not correspond with the allegations of the complaint: *Stout v. Coffin*, 28 Cal., 65; *Hall v. Polack*, 42 Cal., 218; *Algeo v. Duncan*, 39 N. Y., 313.

Grigsby & Wilkes, for plaintiff and respondent.

The writers of the letter of guaranty were not entitled to notice of its acceptance. The shipment of the goods pursuant to the order of Gilman, completed the acceptance of the guaranty, and the admission of the letter-press copy in evidence could not prejudice the defendant, the shipment being conceded and undisputed: 3 Waits' Practice, 420, *et seq.* A witness cannot testify to his understanding of a contract, hence it was not error to exclude the answer in the Lobdell deposition; besides, Lobdell was a witness in person, and his deposition could not be used, except to impeach his oral testimony. The exception to the refusal of the Judge to charge in relation to special verdicts, and the record in that behalf, are too indefinite, and do not point out what defendant asked: *Jones v. Ins. Co.*, 61 N. Y., 79. That the writers of the letter of guaranty are liable under the circumstances of this case, is sustained by all the authorities: Civil Code, Secs. 33, 1690, 1696, 1659, 1660; Brandt on Guar. and S., 105-6; 13 N. Y., 234; 2 Am. Rep., 486; 10 Curtis, 420; 24 Wend., 82; 6 Hill, 543; 21 Wallace, 294; 34 Conn., 27; 11 Wend., 312; 41 Iowa, 479; 73 N. Y., 335.

Plaintiff's and defendants' theories of the facts were both fully before the jury, and the charge of the court placed the issues fairly before them. The evidence was conflicting, and this court will not now disturb the verdict.

KIDDER, J.—This action was brought upon a letter of guarantee,

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which was as follows:

“ Sioux Falls, D. T., March 9, 1878.

“ *Moline Plow Co., Moline, Illinois:*

“ SIRS:—We, the undersigned, are acquainted with Peter Gilman of this place, (formerly of Fondulac, Wisconsin,) and have no hesitation in endorsing him as an honest, capable business man, and deserving of confidence and credit. We think your informant in regard to Mr. Gilman’s business ability and capacity was in error, if not selfish and malicious. We will satisfy all orders Mr. Gilman gives this spring—such as plows and cultivators.

WM. B. DICK,

“

H. GILBERT,

“

JACOB SCHÄTZEL, JR.”

Mr. Dick, having deceased, was not made a party. Peter Gilman took this guarantee and enclosed it to the plaintiff in his letter, which reads:

“ Sioux Falls, D. T., March 9, 1878.

“ *Moline Plow Co., Moline, Illinois:*

“ Will you accept my order under the recommend enclosed? If so, ship me the breakers as ordered; also the cultivators and about six vibrating harrows, (XXX.) I am sorry about such a report as stated to you, but still I will try and satisfy you, and I know you will think so much the more of me.

“

I remain yours,

“

PETER GILMAN.

“ If you accept my order please ship the goods at once, and oblige.

P. G.”

Thereafter during the spring of 1878, Gilman gave to the plaintiff four other orders for plows and cultivators which the plaintiff filled by selling and delivering the same to him at Moline, Illinois, to the amount of \$1,051.05, upon which there was paid \$50.53. The balance is what was sought to recover. Previous to all of

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which Gilman sent an order to the plaintiff, which is as follows:

“ Sioux Falls, D. T., January 21, 1878.

“ *Moline Plow Co., Moline, Illinois:*

“ I hereby order of you the plows and other goods in your price list hereto annexed, to be delivered on board of cars at Moline, Illinois, marked ‘ Peter Gilman,’ at prices and terms of warranty annexed, for which I agree to pay you one-half September 15, 1878, and January 1, 1879, with interest at ten per cent. from maturity, payable at Sioux Falls Bank, Sioux Falls, D. T., exchange or express charges prepaid. Account to be settled monthly by note, payable as above. XXX.

“ All other goods ordered during the season will be on the same terms, and are to be paid for in the same manner. XXX.

“ Discount from this list 30 per cent. Ship on or about March 1, 1878, via cheapest route. PETER GILMAN,

“ M. P. Co. per P. E. FOWLER.”

(Here follows Schedule of Prices.)

This order after looking up the commercial standing of Mr. Gilman the plaintiff declined to fill unless Gilman could furnish good security, and this was communicated to Mr. Gilman before March 9. And there was testimony introduced on the trial below, as the record shows, which tended to prove that said order was “ canceled ” and “ laid away as dead paper,” when the guaranty was received; and there was also testimony which tended to show that it was *in esse* at that time, and that said goods were sold and delivered upon it.

On the 28th of July, 1878, the agent of the plaintiff—without the knowledge or consent of the defendants, or either of them—settled the balance of said account, by taking two notes payable to the plaintiff, one for the sum of \$550.53, with exchange on New York, or express charges, and interest from date at the rate of ten

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per cent. annually until paid, payable the 15th day of September, and executed by Peter Gilman and Wm. B. Dick. The other payable the 15th of November, 1878, for the sum of \$450. (Otherwise the same as above.) Also there was a settlement of same date, signed by Gilman and Fowler, the agent of the plaintiff, as follows:

" Settlement with Peter Gilman, Sioux Falls, Dakota, date July 28, 1878:

" Account M. P. Co.:	Invoice May 20, 1878.
	\$1051.05
" Bills Rec. date July 28, 1878:	Cr.
" Due Sept. 15, 1878.....	\$ 550.53
" Due Nov. 15, 1878.....	450.00
" Cash to balance.....	50.52
" Retained.....	\$50.52.

" PETER GILMAN,

" Moline Plow Co. per P. E. FOWLER."

There seems to have been no objection to the complaint, which counted on the letter of guaranty, and the sale and delivery of the goods to Gilman. The defendants in their answer admit only the writing and sending of the letter, and deny each and every other allegation of the complaint. The answer also sets up that by the agreement under which the goods were purchased, certain terms of credit and payment were agreed upon, and that subsequently, without their knowledge, these terms were, by the principal parties, materially altered, whereby they were exonerated.

The *first* assignment of error was the admitting in evidence upon the trial the letter-press copy of the plaintiff's letter of March 14, 1878, which is as follows:

" PETER GILMAN, Esq.,

" Sioux Falls, D. T.

" Yours of the 9th is at hand and satisfactory. We will ship your goods in a day or so and hope they will arrive promptly.
"

LOBDELL."

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It appears that no foundation was laid for its introduction, and it was objected to upon that ground. The objection was well taken if the investigation stops here, but this letter was written in reply to Gilman's letter of March 9, in which he encloses the defendant's letter of guaranty of the same date, and inquires, "Will you accept my order under the recommend enclosed? If so, ship me the breakers as ordered, and also the cultivators," &c. This letter of Gilman's did not require a reply; the contract between the parties was consummated upon the shipping of the goods. He did not say, "If you accept my order, write me." It was entirely immaterial whether the plaintiff replied to the letter or not. The goods were shipped in response to the letter, and the plaintiff would have been entitled to recover just the same as if no reply had been sent him. We are unable to comprehend in what respect the admission of the copy could affect the recovery, or be an injury to the defendants.

In the celebrated divorce case, *Forrest v. Forrest*, 25 N.Y., 501, the learned Judge who delivered the opinion of the court, said: "It was insisted that the same principles upon which a court of law formerly proceeded in granting or refusing a new trial should be applied to the case; and if evidence had been rejected on the trial of the issues that ought to have been received, or evidence received that should have been rejected, the defendant was entitled to a new trial. This is hardly the rule now in a court of law—for, latterly, even these courts undertake to judge for themselves of the materiality of the evidence found to have been improperly admitted or rejected; and when satisfied that no injustice has been done, and that the verdict would have been the same with or without such evidence, they have refused a new trial." He cited *Doe v. Tyler*, 6 Bing., 561, and other cases, and went on to say: "Courts of equity have, however, been governed by very different principles from those of a court

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“ of law, in granting or refusing new trials of issues of fact. “ Though evidence has been improperly admitted or rejected, if a “ court of equity was satisfied that the verdict ought not to have “ been different, it would not grant a new trial merely on such “ ground.” He cited *Barker v. Ray*, 2 Russ., 63, and other cases.

A rule is laid down in 3 Waits' Practice, 420, sustained by numerous authorities, which we consider as settled, viz: “ That “ whether the error complained of was the admission of improper “ testimony, or the rejection of that which was proper, another “ trial will not be ordered, unless the court, taking the whole of “ the evidence together and connecting it with the Judge's charge, “ thinks that injustice has been done by the error committed.” This is extending the rule further than we are asked to do in the case at bar.

2. Was there error in the ruling out of a portion of the deposition of Chas. W. Lobdell? The deposition was taken by the plaintiff to be, and was, used by him on a former trial of this case. And Lobdell was in court and was a witness, and had testified on the part of the plaintiff in the trial of the case. The defendants offered interrogatory 11, of said deposition, and the witness' answer thereto, which were as follows:

“ *Interrogatory 11.*—Was there any agreement between the “ plaintiff and Gilman, or between the plaintiff and defendants “ that the time mentioned for payment in the order of January “ 21, 1878, should govern for any and all sales made during the “ spring of 1878, under the defendant's letter of guaranty? If so, “ state regarding it.

“ *Answer.*—As I understood it the terms for the season were “ stated in the original order, ‘ Exhibit A,’ and the guaranty was “ for the same time.”

Objected to because the answer was not responsive to the question.

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If this question had been put to a witness upon the stand, and he had answered it in the same manner, it would have at once been stricken out by the court on motion. It is a well settled doctrine that a witness cannot testify as to his understanding of a matter; and it is clear that the answer is not responsive to the question. Although under this objection the court ruled correctly, yet the proper objection would have been, that the witness is here in court, and therefore the deposition is not admissible; then it could not have been used only to impeach the witness after the proper foundation had been laid.

“ The deposition of any witness may be used only in the following cases:

“ 1. When the witness does not reside in the county where the action or proceeding is pending,” * * * “ or is absent therefrom:” Code of Civil Proc., Secs. 469, 479. “ When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that for some cause, specified in section 469 of this Code, the attendance of the witness cannot be procured:” Sec. 482.

3. Refusing to submit to the jury special issues as requested, is alleged as error. At the proper time the defendants presented three special issues in writing, as follows:

“ 1. Did the defendants at the time of giving the letter of guaranty understand that the orders of Gilman, therein referred to, were to be given and filled on credit; and if so, upon what terms of credit?”

“ 2. Were the goods ordered by Gilman and sent by the plaintiff upon the terms of credit specified in the order or contract of January 21, 1878?”

“ 3. Were the terms of credit agreed upon between the plaintiff and Gilman (if any) changed upon the settlement of July 28, 1878, without the consent of the defendants?”

And the defendants asked the court to submit said issues to the jury and instruct them that, in their discretion, they might render a special verdict upon said issues, or either of them, which the court refused to do.

We could properly avoid deciding the question that is here submitted, on the ground of irregularities in the presenting the questions to the court below. The questions—as shown by the abstract brought up—it is true, were in writing; but there was no instruction “reduced to writing,” (Code, Sec. 248,) asking the court to so submit the issues as required by the Code, that the Judge might “write on the margin thereof the word ‘*refused*,’ or ‘*given*,’” to indicate whether he approves the same. Hence we might say, the issues are not before us.

Again, there does not seem to have been a *scintilla* of evidence submitted to the jury upon the *first* issue. And it is evident—on examining the pleadings—that the *second* nor the *third* covered all the issues involved. But as this court has never passed upon the question sought to be submitted, we will waive all technicalities and meet the point squarely.

The Code, section 261, is as follows: “In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in *all cases* may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon.”

We have reviewed all the authorities that the learned counsel for the defendants relied upon at the bar, and, after careful consideration, we find that but one of the cases can be considered as authority upon the question under discussion, and that sustains the position claimed by the plaintiff. *Jones v. The Insurance*

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Co., 61 N. Y., 79, was an action brought upon a policy of life insurance, issued by the defendant to the plaintiff, upon the life of one Newning.

When the testimony was closed the court submitted three questions to the jury, stating it would determine the case, except upon those issues. To this submission, in this form, the defendant excepted. There were also other questions not material here. Judgment was for the plaintiff.

The defendant claimed that there was a mistrial, or such an irregularity that the judgment should be reversed.

The court in delivering the opinion says: "The irregularity complained of consists in the fact that the Judge submitted three questions to the jury without their going through the form of finding a verdict, either general or special, and on receiving affirmative answers to two of these questions, which made any finding on the third unnecessary, proceeded to order the entry of judgment. The proceeding was plainly informal, and it is insisted that the irregularity was of such a kind as to amount to a mistrial." The objection was as to the *form* of the verdict, and the court cited the 176 section of the New York Code, the same substantially as ours, "that the court shall in every stage of an action disregard any error or defect in the pleadings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of any such error or defect."

The Iowa case, *Schultz v. Cremer*, (No. 2,) 13 N. W. Rep., 59, was an action for damages for the alleged wrongful conversion of property. The defendant pleaded the general denial. A trial by jury and a *special* but not a general verdict. The court rendered judgment for the plaintiff. The defendant appeals.

The court say: We infer from the record, "that the court directed the jury, against the objection of the defendant, to re-

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“turn only a special verdict. A jury may, in their discretion, render a general or special verdict: Code, Sec. 2808. They may, also, when they render a general verdict, be required to render a special verdict in addition: See section above cited. The language is: ‘In any case in which they (the jury) render a general verdict, they may be required by the court * * * to find specially upon any particular question of fact to be stated to them in writing.’ The statute does not authorize the court to require a special verdict except in addition to a general verdict. The rendition of a special verdict without a general verdict is left solely to the discretion of the jury. * * * But it appears to us that every party has a right to a general verdict if he demands it and the jury sees fit to render it. * * * We think the court erred in directing the jury, against the defendant’s objections, to render a special verdict only.” The judgment was reversed.

The only point in this case was, that the court directed the jury against defendant’s objections to find a *special* verdict only.

Peck v. Snyder, 13 Mich., 21, was an action brought to recover damages for not building a house and barn according to the contract, and was tried by a jury.

The court in delivering the opinion says: “I can see but one exception taken below, to which our attention can be directed, and that is, to the refusal of the Judge to direct the jury to find specially, upon certain questions, in case they found a general verdict. This is a novel request. A jury may find a general or special verdict, according to the exigencies of the case; but a Judge cannot direct or compel them to do either, and more particularly, not to give reasons for a general finding.”

This, seemingly, is the authority in point. The jury cannot be required to give a special verdict, although they may give one: 1 Burrill’s Practice. 242; Tidd’s Practice, 897.

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It is conceded by the counsel that "*in all other cases* the court *may* direct the jury." "This," he says, "undoubtedly makes it discretionary with the court in all such '*other cases*,' but excludes the idea of any discretion on the part of the court for the recovery of money only, or specific real property. In these two classes of cases *the discretion is solely with the jury*. And we submit that the Court erred in denying or interfering with the jury." The specific objection to the ruling of the Court is that he did *not* interfere with their discretion. He was asked to submit the issues to the jury and instruct them that in their discretion they might render a special verdict, which was denied. This was not interfering with their discretion. They were left with the law as it is, without any suggestion or intimation from the Court, to render in their discretion "*a general or special verdict*."

"And in *all cases* [the Court] may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." This clause of the section (261) covers the first clause for the recovery of "money only," etc. The Court, then, in *all cases* may instruct them, if they render a general verdict, to find specially. And we agree with the defendants' counsel that it is "discretionary with the Court in all *such other cases*." This being so, it is plain to us, that the words, "*and in all cases*," include all the cases mentioned in said section; and, therefore, the discretion is in the Court whether he will so charge, or not. It should be so. He sees the points in a case as the trial progresses, and is expected to exercise a reasonable judicial judgment as to how he will present the law to the jury in endeavoring to aid them in the application of the facts thereto. When the testimony is closed he is expected to comprehend the case, and from his disinterested stand-point, to administer the law in such a manner as will tend to meet out such substantial justice to the parties as they shall, respectively, seem

to merit from the facts therein and the law applicable thereto.

It is his duty to charge the jury, whether requested or not, upon every point material to the decision of the case, upon which there is evidence, and to charge correctly and fully.

In regard to written requests, the Court is not bound to regard them in his charge, unless they are couched in such language as to be sound to the full extent. The fact that some sound law might be extracted therefrom, is not enough. They must be wholly sound law, and without any necessary qualification. Although a party may not be entitled to the particular charge to the jury which he requests, yet it is the duty of the Court to charge as the facts in the case require. The Court is not required, in a charge to the jury, to answer every request of the parties in the words made use of in the requests; he must instruct the jury correctly as to the law, but may adopt his own language. And, where in the charge, on his own motion, he covers the charge requested, he is at liberty to refuse the charge. A substantive proposition of law may be refused unless connected with the case.

As in the case at bar, on looking into the charge of the Court, it is discovered that the charge more than covered the issues that were refused; therefore, the Court could have refused them for that reason.

The Code says: "The jury, in their discretion, may render a general or special verdict." Counsel inquire, "how can they know such is the law unless the Court declares it?" It is too late in this age of intelligence and progression to make such an inquiry. Men of this generation who are capable of adapting the elements and things in the natural world to such practical use and benefit as may every where be seen, and have made such rapid strides in improvements in all the departments of life—men who are qualified to instruct in the arts and sciences are capable of contemplating general results without the aid or dictation of the Court.

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Blackstone, a long time ago, said: "The trial by jury is the *Palladium* of our civil rights."

Our Legislative Assembly, no doubt, so thought when it passed the law. Be that as it may, we take up the law as we find it, and our duty only is, to construe it.

4. Counsel waives the exceptions to the charge, except as to the plaintiff's request number *two*, embraced therein. And in order to have a proper understanding of this part of the charge we should read the whole paragraph together, which is as follows: "If you believe from the evidence that the plows and cultivators were sold and delivered to Gilman on the orders of Gilman, dated the 9th of March, 1878, and thereafter, in connection with the letter of the defendants to the plaintiff, then the plaintiff was authorized by this letter of the 9th of March to hold defendants liable for all the orders of Gilman given in the spring of 1878." [Here follows the part excepted to.] "And at the expiration of that time plaintiff was at liberty to accept the notes of Gilman & Dick for the goods ordered by him during said spring, and to follow out its usual course of dealing in such cases, and the defendants are not discharged from their obligations imposed by said letter because of such settlement and the taking of such notes."

In this connection, the Court further instructed the jury, not excepted to, if "you find from the evidence that the order of Gilman on the plaintiff, dated the 21st day of January, 1878, was the agreement between the plaintiff and Gilman upon which the plows and cultivators were sold and delivered to Gilman; and if you further find from the evidence that by the terms of the agreement of purchase, said Gilman was to pay for the goods bought by him—one-half on September 15th, 1878, and the balance on January 1st, 1879, with interest at ten per cent. per annum from maturity, and that the accounts for such goods were

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“to be settled by him monthly by note, payable as above mentioned as specified in the order of January 21st, 1878; and that afterwards on or about the 28th of July, 1878, upon an accounting and settlement between the plaintiff and said Gilman, said agreement was by the plaintiff, without the consent of the defendants, altered in any respect, in the time of payment, or in the proportionate part payable in the first payment, or in the matter of interest, then such alteration would exonerate these defendants, and the plaintiff cannot recover in this action,” etc.

He further charged that the jury should consider whether the settlement and taking of the notes impaired or suspended the plaintiff's remedy in any respect against Gilman; and if it did, the defendants were exonerated.

And, also, if they found there was any suspension of the plaintiff's remedy without the consent of the defendants, they should find for the defendants.

On examining the record and the whole charge, we can see that the prominent issue in the case was whether the goods were sold and delivered on the order of Gilman, dated on the 21st of January, 1878, or on his orders of the date of March 9th, and afterwards. It appears to us that the Court in his charge placed this issue fairly and squarely before the jury, and they found for the plaintiff; that is, that the contracts for the sale of the goods were the orders of Gilman of the dates of March 9th, and thereafter. Taking the whole charge together—and it should be so construed,—we think it is a very fair, correct and clear exposition of the law applicable to the case.

The jury having found for the plaintiff, thereby ignoring the claim of the defendants that the contract between the plaintiff and Gilman was the one of the 21st of January, 1878, the question as to the discharge of the defendants from the liability incurred by their letter of guaranty, who defend as guarantors, upon the ground

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of an alteration of the contract by the principal parties, without their knowledge or consent, does not now arise. But *quaere*—whether shortening the time of payment impairs or suspends the remedies or rights of the creditor against the principal in respect thereto: Civil Code, Sec. 1665.

5. Is the evidence sufficient to sustain the verdict? On reading the testimony in this case and applying it to the issues made by the parties in the pleadings, we can come to no other conclusion than that there is therein a substantial conflict; and this being so, the question can hardly be considered an open one here. This court on two occasions has decided this question: *French et al. v. Lancaster et al.*, 9 N. W. Rep., 716; *Caulfield et al. v. Bogle*, 11 *id.*, 511, and cases therein cited. In the latter case the learned Judge who delivered the opinion, says: "There was evidence presented to the court below on the trial by both parties bearing upon these questions, and this evidence was more or less conflicting. That court had the opportunity to see the witnesses, to note their appearance and conduct, and could judge of the preponderance of evidence far better than an appellate court, not having had such opportunity, possibly can. After weighing the evidence in the light of all these circumstances, that court made its decision which was equivalent to a finding of fact. In such cases courts have always hesitated to disturb the verdict of a jury, or the findings of a court, upon a question of fact, the evidence being conflicting, and will not, unless great injustice appears to have been done, or there is an entire want of evidence to sustain it."

Such has been the current of decisions in this country, unless in some of the States where this subject is controlled by statute. In *Humphrey v. Havens*, 12 Minn., the court says: "It has been repeatedly held in this court and elsewhere, that, as a general rule, the findings of a jury, a court, or referee, upon a question

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“ of fact, will not be disturbed when there is any evidence reasonably tending to sustain it.”

The federal courts sustain the same doctrine: 8 Wal., 337; 9 Wal., 38.

There seems to be no conflict of authority upon this point, and they must be decisive upon this question. No error appearing in the record, the judgment of the court below is,

AFFIRMED.

All the Justices concurring.

MAY TERM, 1883.

PRESENT:

HON. ALONZO J. EDGERTON,	CHIEF JUSTICE.
HON. JEFFERSON P. KIDDER,	} ASSOCIATE JUSTICES.
HON. SANFORD A. HUDSON,	
HON. WILLIAM E. CHURCH,	

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1. **QUESTIONS OF FACT: VERDICT FINAL AS TO: EVIDENCE SUFFICIENT.** When questions of fact have been fairly and fully submitted to a jury, under proper instructions, the verdict is final so far as this court is concerned, there being competent evidence to sustain it.
2. **EXCEPTIONS: PARTNERSHIP: DISSOLUTION OF INSOLVENT: NOT CONSTRUCTIVE FRAUD: PARTNERS MAY CLAIM EXEMPTIONS.** The dissolution of an insolvent firm, and a division of its assets between the partners, accomplished without actual fraud, even though it be done for the purpose of securing to the members of the firm the benefits of individual exemptions, is not a constructive fraud upon creditors, and will not deprive the partners of their right to individual exemptions out of former firm property.

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3. **EXEMPT PROPERTY: NOT CAPABLE OF FRAUDULENT ALIENATION.** Within the terms and limit of an exemption law, any acquisition of property or exchange of property which is exempt, is lawful, and exempt property is not susceptible of fraudulent alienation or disposition.
4. **SAME: DUTY OF OFFICER: PROPERTY PRIMA FACIE SUBJECT TO LEVY.** All property not absolutely exempt, is, under our law, prima facie subject to levy; but the debtor has no duty to perform, in the surrender of property upon legal process, or until actual levy, and notice of the levy as required by statute.
5. **SAME: APPRAISEMENT: DEBTOR NEED DO NOTHING.** The debtor is not required to anticipate the levy, or do any act to extend it; hence it is held, that the refusal of an instruction that, "If the debtors kept back, detained or concealed their personal property or any part thereof, so that it could not be appraised, then they are not entitled to the benefit of the exemption law," was not error.
6. **SAME: OBSTRUCTION OF LEVY.** Query: Whether actual obstruction of the levy, or concealment of property to prevent a levy might operate as a selection by the debtor under the exemption law, not decided.
7. **DAMAGES: AMOUNT OF.** There being no valid objection to the charge of the Court on the question of damages, the amount of the recovery was entirely with the jury, particularly in this case where exemplary damages may have been given,

Appeal from the District Court of Minnehaha County.

The facts are fully stated in the opinion.

Wilkes & Wells, for appellant.

Winsor & Swezey, for respondents.

KIDDER, J.—This action was brought by Clark E. Bates against Henry Callender, as sheriff of Minnehaha county, for the wrongful detention and conversion of personal property, claimed by the plaintiff as exempt. The cause of action is predicated upon section 324, Code of Civil Procedure, providing for the exemption of

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personal property, not to exceed \$1,500 in value, to be selected and appraised as prescribed in sections 326 to 331 inclusive.

The answer seeks to justify by virtue of a warrant of attachment issued from the District Court, in an action by the *City Bank of Minneapolis*, against the *plaintiff* and one *Charles Bates*, alleging that the defendants in that action were shortly before the levy co-partners, under the name of C. Bates & Son; that said action was founded upon certain notes of the firm, and that the property seized was the property of said firm, and not the property of the plaintiff; and further alleging, that after the levy the defendants therein agreed to a partnership appraisement; that they detained from the appraisers other property and refused to have all their property appraised.

As a further defense the answer alleged that shortly before the levy, the plaintiff and said Charles Bates, as co-partners, being insolvent sold and disposed of a portion of their property, dissolved the firm and made a division between themselves of the residue of their property, with intent to defraud their creditors, and that the property in question was in part the property so divided. The trial resulted in a verdict and judgment in favor of the plaintiff for \$1,500.

The firm of Bates & Son was dissolved on October 21st, 1879, and a formal notice of dissolution, published in one of the local newspapers for three weeks, ending on November 5th, 1879, prior to the commencement of the action in which the attachment was issued; and that upon the dissolution and settlement the plaintiff, by agreement with his partner, received as his individual property \$500 or \$600 in money, and a team, harness and wagon. With this money the plaintiff purchased the two loads of provisions, which, with the wagon, were the property in question.

The evidence also tended to show that at the time of such disso-

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lution said firm was indebted to various creditors, and was insolvent.

On the same day the property was attached, the plaintiff caused to be served on the defendant, as sheriff, a claim in writing for his exemptions, demanding also the return of said property. Two days later an appraisalment was had under the statute, and the proceedings therein, as shown by the record, are entitled in the action wherein the warrant of attachment was issued. These proceedings appear to have been taken in substantial compliance with the statute:

(1.) There is first a notice on behalf of the plaintiff, bank, returned served by the sheriff on Clark E. Bates, by delivering to him a copy thereof, on November 13th, 1879.

(2.) Also an oath of three appraisers, described as disinterested citizens of the county, reciting that one of them was selected by the defendants—one by the plaintiff and the other by those two persons, and taken and subscribed before the sheriff on the same day, to the effect that they would truly, honestly and impartially appraise the property of said debtors.

(3.) And lastly a return, signed by the sheriff and appraisers, with an inventory annexed, in which they certify that the inventory is a true one of all the property seized by the sheriff in the action, and the value of each article of personal property as the same has been appraised by us.

In the inventory, the items identified as the property in question, are set down (on page one) as follows:

One old lumber wagon,	\$ 25 00
One set of new harness,	25 00
Contents of two loaded wagons,	236 00

The evidence also tends to show that after the appraisalment was completed, several further requests were made on behalf of the plaintiff for the return of the property, and some assurances given

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by the sheriff that it would be returned. Finally upon receiving an indemnifying bond he decided to hold the property.

I. Before considering the exceptions chiefly relied on by the appellant, we will examine the assignments of error, relating to the ownership of the property in question, and the appraisal of the same. Upon both these points the question was one of fact for the jury, and appears to have been fully submitted to their determination.

It has become well settled in the States, where statutory provisions for a partnership exemption do not exist, that an individual cannot claim an exemption out of unsevered partnership property: *Bonsal v. Comly*, 44 Pa. St., 442; *Pond v. Kimball*, 101 Mass., 105; *Gaylord v. Imhoff*, 26 Ohio St., 317; *Russell v. Lannon*, 39 Wis.; *Guptil v. McFee*, 9 Kan., 30; *State v. Spencer*, 64 Mo., 355. To the same effect are the *Tennessee* and *Nebraska* cases cited by appellant's counsel from the American Reports.

And although the statute of this territory expressly allows one partnership exemption out of partnership property, there is nothing in the statute indicating an intention to allow a several exemption out of partnership property; and indeed the language would seem to exclude such a construction: "A partnership firm can claim but one exemption of fifteen hundred dollars in value * * * out of the partnership property, and *not a several exemption* for each partner:" Sec. 333. Therefore the question of fact was involved in this action, whether the property, when taken, was the property of the plaintiff or the property of the late firm of C. Bates & Son. But this precise question was fully submitted to the jury, under an instruction requested by the defendant, (number two given), that if the jury should find from the evidence that the property was at the time of the levy partnership property of the firm of C. Bates & Son, or was purchased with the money of said

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firm, * * * then the plaintiff cannot recover. And in a subsequent portion of the charge the Court bases the right of recovery upon a finding by the jury that the plaintiff was at the time of the levy the actual *bona fide* owner of the property. Thus submitted, the verdict of the jury must be conclusive on this question. And the record presents abundant evidence to support the verdict in this respect.

Concerning the appraisement of the property we reach the same conclusion. The evidence is very slight, if indeed there is any, tending to show a *partnership appraisement* as claimed by appellant. The record evidence discloses nothing tending to show such an appraisement. The action in which the attachment was issued being founded upon an indebtedness, for which the plaintiff was liable, jointly and severally, with his late partner, was necessarily against both as defendants, but this did not continue or renew their former partnership relations. Nor did the fact that other property, claimed by his co-defendant, was taken upon the same warrant, and appraised by the same appraisers, determine the appraisement to be a partnership appraisement, especially in view of all the other evidence in the case. The defendant says in his direct testimony, that after some talk "an appraisement was made as partnership property that I made return on." But an examination of his return does not show any appraisement *as partnership property*. And his remark must be taken in connection with his admissions on the stand, that the plaintiff did not interfere or take any part in the appraisement, but stood by "claiming a separate exemption." Moreover the statute provides that such an appraisement must be made "under the *direction* of the sheriff or other officer:" Sec. 326.

But upon all the evidence on this subject the question was submitted to the jury, and in the same instruction above referred to, given at the request of the defendant, the jury were plainly in-

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structed that if the firm of C. Bates & Son claimed the property, and offered to have or did have the same appraised as partnership property, then the plaintiff could not recover in this action. On this issue, therefore, if the evidence tends to show any partnership appraisement the verdict of the jury is decisive against the defendant.

II. The principal contention, however, on the part of the appellant arises upon the refusal of the Court below to instruct the jury as requested, respecting the right of the firm of Bates & Son as against their creditors to dissolve and apportion their partnership property, and the right of the plaintiff to acquire in severalty portions of such property.

The proposition is thus stated in defendant's third request, refused by the Court: "If it should appear to you from the evidence that the firm of Bates & Son were insolvent at the time of their alleged dissolution of partnership, then they had no right to make such dissolution, and a division of their partnership property as against firm creditors thus made, is void; and all such property must remain as partnership property subject to the rights of firm creditors, except that the partnership might claim one exemption of \$1,500 in value out of said property; and if it should appear to you from the evidence that this plaintiff as an individual makes a claim of exemption in property, which had been the property of Bates & Son, and was divided up by the partners just prior to the levy, * * * then such claim cannot be maintained, if said firm was insolvent as above stated."

This proposition was reiterated in the other requests refused, and presents the question for our decision. Whether this statement of the law can be maintained in its full import in a case where creditors have obtained by legal remedies a lien upon partnership property, or where it is within the control of a court of equity, or a probate or bankruptcy court, for due application or

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distribution, we do not now decide. It will be observed that the proposition advanced is not based upon actual fraud, but would have the court declare the dissolution of a firm and the division of its effects when insolvent, a legal or constructive fraud.

But we are clearly of the opinion that such a doctrine has no just application in a case involving a debtor's right to his lawful exemptions out of his individual property, although it may formerly have belonged to a partnership of which he was a member. In the case of *Worman v. Giddy*, 30 Mich., 151, the proposition is squarely decided against the appellant. The facts in the case are strikingly similar to those in the one at bar, and Graves, C. J., in the opinion says: "Until legal proceedings, adapted to bind the property, were had, the owners were not precluded from reducing their joint holding to separate ones; and the evidence for the plaintiff went to show that the joint interest was severed, and the whole right in these goods vested in the plaintiff, not only before the seizure on the execution, but previous to the commencement of the suit. The fact that the property had been some time before held by the plaintiff and Penrose as partnership property, was of no consequence in so far as the right of exemption was concerned. That circumstance could not have the effect to impress upon the property a permanent quality or character by which it would continue forever subject to be treated as firm property. By the division the plaintiff became separate owner prior to the suit brought by Lichtenberg & Sons, and his right to hold under the exemption laws was not made abortive by reason that the property came to him from the firm, and was taken by defendant on a debt of the firm."

In a late case in the Supreme Court of Ohio, *Mortley v. Flanagan*, just reported but not published, I find in the opinion the following: "Where the members of a firm acting in good faith, dissolve the partnership, and one member sells his interest in

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“ the partnership property to the other, the latter will not be de-
 “ prived of the right to hold such property exempt from the pay-
 “ ment of a debt theretofore asserted against him, on the ground
 “ that such debt was a partnership debt due at the time of the
 “ dissolution; nor will the fact that the partners knew the firm to
 “ be insolvent at the time of such dissolution, make any difference.”
 The case in the 30 Michigan *supra* is cited therein with approval.

There are certain well defined principles of law which entirely support the authority of this case. A partnership is, in law, one person, and has the same control and dominion over its affairs as any other person. And the law knows no way to prevent the dissolution of a co-partnership. And until firm creditors have acquired a lien upon partnership property, or it has passed into *custodia legis*, the law knows no way to prevent the disposition of the same by the firm itself.

Case v. Beauregard, 99 U. S., 119: In this case the court say:
 “ So if before the interposition of the court is asked the property
 “ has ceased to belong to the partnership, if by a *bona fide* transfer
 “ it has become the several property either of one partner or of
 “ a third person, the equities of the partners are extinguished, and
 “ consequently the derivative equities of the creditors are at an
 “ end. It is, therefore, always essential to any preferential right
 “ of the creditors that there shall be property owned by the part-
 “ nership when the claim for preference is sought to be enforced.”
 Citing many cases.

Day v. Wetherby, 29 Wis., 363; *Atkins v. Saxton*, 77 N.Y., 195: In the latter case it is *held* that a division of partnership property, and a transfer by one of the partners to the other, in proportion to their several interests, for the purpose of preventing the seizure thereof by the individual creditors of the insolvent partner, is not unlawful; and that an intent to defraud creditors cannot be predicated of an equitable division of partnership prop-

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erty. From these general principles, decided in analogous cases, we come to the precise question in this case: Is it the reasonable doctrine of the law that the mere dissolution of an insolvent firm, and the division of its assets, accomplished without actual fraud, even though it be done for the purpose of securing to the members of the firm the benefit of individual exemptions, would amount to such a legal or constructive fraud as to deprive the debtors of such exemptions? We think such is not the legal result. Exemption laws are beneficial in their character, are intended for the benefit of the debtor class and their families, and should be fairly and liberally construed: *Wilcox v. Hawley*, 31 N. Y., 648; *Newton v. Howe*, 29 Wis., 531; *Kuntz v. Kinney*, 33 Wis., 570; *Rosenthal v. Scott*, 41 Mich., 632; *O'Donnell v. Segar*, 25 Mich., 367.

And within the terms and limit of an exemption law, any acquisition of property, or exchange of property into property which is exempt, is entirely lawful. See the case in 25 Michigan, above cited. And within the same principle, exempt property is not susceptible of a fraudulent alienation or disposition: Bump on Fraudulent Conveyances, 242, and many cases cited; *Derby v. Weyrich*, 8 Neb., 174; *Pike v. Miles*, 23 Wis., 164; *Wilcox v. Hawley*, 31 N. Y., *supra*.

Upon the authority of *Worman v. Giddy*, *supra*, and the cases now referred to, and considering the character and object of exemption laws, we are led to the conclusion that the District Court did not err in refusing the defendant's requests, and in charging the jury that the members of the firm of Bates and Son had a legal right upon a dissolution of the partnership, "to divide and apportion this property, and acquire each a specific portion thereof in severalty as his own separate property;" and if they should "find " from the evidence that the plaintiff did in fact acquire a portion " of the property in question about October, 1879, from said firm

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“ by agreement with his co-partner in consideration of certain
“ other property retained by him out of the partnership property,
“ and thereby became and was at the time of the levy the actual
“ *bona fide* owner thereof, then his ownership and title as to such
“ portion cannot be impaired by the fact that it may have formerly
“ belonged to said firm.”

The second request refused was also inappropriate, in assuming that a partnership exemption was claimed in this case, and in asking an instruction beyond the case, regarding the rights and duties of a *partnership* under the exemption law.

III. In the same request this instruction was requested: “ If
“ the *debtors* kept back, detained or concealed their personal prop-
“ erty, or *any part thereof*, so that it could not be appraised, then
“ they are not entitled to the benefit of the exemption law, and
“ their claim to the property taken on the writ of attachment by
“ the officer may be disregarded.”

This request is objectionable in referring to the alleged acts or conduct of “ the debtors,” meaning, we suppose, the defendants in the attachment, and not to any acts or conduct of the plaintiff himself. Nor are we able to find in this record any evidence that the plaintiff detained or concealed any of his property.

But as the learned counsel for appellant have, in argument, insisted upon the proposition intended by the request, we will briefly consider the same. We are aware that in some of the decisions expressions of opinion are to be found which would seem to countenance the doctrine contended for by counsel. The assertion is that any detention or concealment of personal property by a debtor, so as to hinder or defeat a levy, or an appraisal by the proper officer, is in effect a *selection* of such property, and as to other property, to that extent, operates as a waiver of the benefit of the statute. Such a result might follow under a statute or system of

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laws, making a writ a lien generally upon all the debtor's personal property, within the jurisdiction of the officer, or making it the duty of the debtor, when demanded by the officer, to surrender property in satisfaction of the writ.

But such is not the effect of our statutes on the subject. Our statute concerning the execution and levy of the same expressly declares that "no writ of execution shall be a lien on personal property before the actual levy thereof:" Sec. 317. The same section allows the officer, after having made one levy, at any time thereafter, within the life time of the execution, to make other levies, if he deems it necessary. The same must be true in the case of the levy of an attachment. In the execution of such a warrant the officer is required to "seize" and "take into his custody" the personal property of the debtor: Secs. 202, 204. In all cases the officer is specifically authorized to levy upon any and all goods, chattels, moneys, and other property, both real and personal, not exempt by law; and is directed by the statute, in detail, as to the method and manner of levy and sale. But we find no provision of the statute making legal process in any form a lien on personal property, before the actual levy thereof, or making it the duty of the debtor to seek out the officer, and surrender to him property on such process.

In order to protect the debtor in his exemptions, however, the statute provides: "In all cases of a levy upon personal property " by a sheriff, constable, or other officer, he must give notice " thereof to the debtor, (or to certain persons named for him), and " the debtor, or such other person for him, must claim or demand " the benefit of these exemptions within three days after such notice from the officer; and said notice of levy may be by copy or " by reading:" Sec. 331.

As therefore all property, not absolutely exempt, is under our law *prima facie* subject to levy, and the authority of the officer is

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ample, and his duties plainly marked out, this court must hold that the debtor has no duty to perform, in the surrender of property upon legal process, until actual levy; and in the assertion of his exemptions against such process, has no part to perform, until he receives notice of the levy, as required by the statute. And inasmuch as the appraisement provided for in the exemption law is only for the purpose of determining the valuation of the property, and to enable the debtor to select his exempt property, within the limitation in value, and must necessarily succeed the levy and notice of levy, we cannot hold that the debtor should anticipate the levy, or do any act to extend the levy; nor that the appraisement should extend to property not in the custody of the officer. The officer may make new levies, extend the levy from time to time over sufficient property to satisfy the writ; but until a levy there is no occasion and no foundation for appraisement proceedings to determine the limitation in value under the exemption law.

In view of our statute law, therefore, this request, which in effect required the Court to advise the jury, that the mere detaining, or concealing by a debtor, of any part of his personal property, not levied upon, or in the custody of the officer, so that it could not *be appraised*, would in law deprive him of the benefit of his exemptions, was incorrect and properly refused by the court below.

Whether actual obstruction of *the levy*, or concealment of property to *prevent a levy*, might in any case operate as a selection by the debtor, under the exemption law, we do not decide. But we hold that a levy, and a notice thereof, must precede the claim for exemption, as well as the appraisement which is to carry out this claim for exemptions, and that the request was erroneous.

That the concealment of property from the officer is no defense against a claim for exemption, is distinctly held in *Megehe v. Draper*, 21 Mo., 510; and *Elder v. Williams*, 16 Nev., 416.

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IV. As to the assignment of error in reference to the amount of damages, there is no error for review by an appellate court. It is conceded that the recovery was several hundred dollars more than the actual damages proved, but no exception appears to the charge of the Court on the question of damages, except as to the valuation of the appraisers not being the measure of damages, and this was not referred to on the argument. The instruction however on this question was proper, and it is so held concerning an appraiser's valuation under a similar statute in Iowa: *Flannigan v. Wheeler*, 9 N. W. Rep., 381, and our statute provides that the appraisalment for exemption purposes must be made "at the usual price of such articles at sheriff's sale, as near as can be ascertained:" Sec. 328. This is manifestly an improper measure of value in an action for conversion.

There being no valid objection, then, to the charge of the Court on the question of damages, the amount of the recovery was entirely with the jury. There was evidence of hardship upon the plaintiff, and evidence from which malice and oppression on the part of the defendant, under the color of authority, and misconduct in office, may have been inferred by the jury, for which under the charge of the Court, exemplary damages may have been given.

No error appearing in the record, the judgment of the court below is,

AFFIRMED.

All the Justices concurring.

Finney v. Northern Pacific R. R. Co.

FINNEY v. NORTHERN PACIFIC R. R. Co.

1. **SETTING ASIDE VERDICT: WHEN.** This court has decided that neither the verdict of a jury, nor the findings of a court upon a question of fact should be disturbed, when the evidence is conflicting, and they will not be unless great injustice seems to have been done, or there is an entire want of evidence to sustain the verdict or finding.
2. **SAME.** But it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether, on all the evidence the preponderating weight is in his favor—that is the business of the jury—but whether, conceding to all the evidence offered the greatest probative force, which, according to the law of evidence, it is fairly entitled to, it is or is not sufficient to justify a verdict. If it is not sufficient, then it is the duty of the court, after a verdict, to set it aside and grant a new trial.
3. **SEMBLE: DIRECTING VERDICT.** When the Judge is clear of doubt that a verdict ought to be rendered either for plaintiff or defendant, and that it would be his duty to set a contrary one aside, he ought to instruct the jury so to find. Such a direction cannot properly be given to the jury unless the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly.

Appeal from the District Court of Cass County.

The facts pertinent to the points decided are stated in the opinion.

W. P. Clough, for defendant and appellant.

H. F. Miller, for plaintiff and respondent.

KIDDER, J.—This action was brought by the plaintiff to recover damages claimed to have been sustained by him while being thrown out of a freight car of the defendant by its servants.

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There was a trial by jury and a verdict for the plaintiff. A motion for a new trial was made and overruled, and a judgment entered for the plaintiff, from which this appeal was taken.

The assignments of error were these:

1. The ruling of the Court by which counsel was permitted to cross-examine Fields, as to whether he was not then under indictment for injuring the plaintiff, and for the crime of maiming.

2. That part of the charge of the Court, which is in the following language: "The defendant's agent is bound to use due care and prudence in expelling passengers from its cars; and although the plaintiff was a trespasser at the time of the accident, and was wrongfully on the cars at the time, the defendant would be liable for damages arising from the wanton and malicious act of its servants while they are executing what they supposed to be the order of the company, even though the order did not in fact contemplate such acts."

3. The denial by the Court of defendant's motion for a new trial, based among other things, upon the ground that the evidence did not justify the verdict.

The conclusion at which we have arrived renders it unnecessary in determining this case to consider only one of the assignments of error (the 3d.) Does the evidence justify the verdict?

It appears from the certificate of the Judge who tried the case below that all the evidence adduced on the trial was brought up in the record.

The plaintiff, James Finney, testified as follows: * * * *
I went into the box car and I took my coat off and my hat, and laid it on the corner of the car—box car—the west end of the car; laid my coat down and rolled it up and put it under my head, and took my shoes off. I rolled my coat up and put it under my head in the car. It was a very warm day; got in to have a little sleep

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and a little rest; was tired; I put my coat under my head and took my shoes off; and I was in there about two hours, and I seen two men come in the car; I didn't see them; I was asleep at the time; they came in and gave me a kick in the feet and wakened me up; I recognized one of them as having light chin whiskers, and a light straw hat on. He says to me, "Git out of this car;" I says, "All right, sir; just as soon as I put my shoes on." I asked him if I could put my shoes on, and he studied awhile. While he was studying that way I got one shoe on my foot; just as I got one shoe on he grabbed me around the legs and dragged me on my back.

Q. How far?

A. Over to the car door; there I was getting up on my knees. Just as I got up on my knees—just about the time I got straightened in front of him—I got a poke of the iron bar in my eye.

Q. You say just about the time you got straightened up you got a poke of the iron bar in your eye?

A. Yes, sir; just about the time I got straightened up—wasn't hardly straightened up at the time I got the poke—well, at the time I got the poke I got shoved out of the car; with his left hand he shoved me out of the car, and I fell down on the ground on my back.

Q. What did he do (Fields) then, after that?

A. He jumped out on the other side of the car. There was another man with this one; two of them came in the car; they jumped out on the other side of the car, and they shoved me out on the other; they shoved me out on the south side, and they jumped out on the north side and ran away.

Q. You say you recognized one of these men in there as having chin whiskers and a mustache?

A. He had a mustache and light chin whiskers down here. He had a straw hat on.

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Q. State if you knew at the time what his name was?

A. I heard some of the boys talking about him before this happened.

Q. Have you since learned what the name of the man was that you identified at that time?

A. Yes, sir.

Q. What was his name?

A. Dick Fields, or Richard Fields, rather.

Q. Do you know whether he was in charge of the company's cars and property there?

A. Yes, sir.

Q. What did you do after you got knocked down on to the ground?

A. I laid there about half an hour until I regained my senses. I didn't know just what the nature of the thing was. I thought my eye was knocked out, so I told a gentleman who was going by if he wouldn't go in the car and throw out my coat and one shoe. He got in the car and threw out one shoe for me and my coat and my hat. I sat there about ten minutes, I should judge, then I regained my senses, and I started up for the city here. Came up to Dr. Darrow's office and Dr. Darrow wasn't in at the time; he was away. I laid down outside.

Q. Laid down outside, where?

A. Outside of the bank building, over there.

Q. Of what bank?

A. The First National Bank, I believe. I laid down there a little while, and somebody went for Dr. Darrow. Dr. Darrow came round and examined my eye, and sent me to the county hospital here in Fargo.

Q. Now state if you lost that eye from the result of that accident?

A. I did, sir.

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Q. From the result of that blow?

A. From the result of that blow. * * *.

Q. When Mr. Fields ordered you out of the car did you try to get out as soon as you could?

A. Yes, sir. I told him I would just as soon as I put my shoes on, and he wouldn't give me time to put one shoe on.

Q. You told him you would as soon as you could get your shoes on?

A. Yes, sir. I told him I would just as soon as I could put my shoes on. He wouldn't give me time to put my shoes on; grabbed me by the legs and dragged me over to the car door; only had time to put one shoe on.

Q. Did you make any resistance—refuse to leave the car?

A. No, sir. Not anything, whatever.

Q. Was you going out just as rapidly as you could?

A. Yes, sir. Just as fast as I could I was going out of the car.

Q. State if from the result of that blow you have lost your eye?

A. Yes, sir. I have lost my eye for my natural days, I suppose. My eye is gone.

Cross-examination: Q.—What time of day was it you went into that car, Mr. Finney?

A. I should think, sir, that it was about half-past ten.

Q. About half-past ten?

A. About ten o'clock or half-past ten in the forenoon—in the daytime.

Q. What time was it they came into the car and woke you up?

A. I should judge, sir, it was about half-past twelve or one o'clock.

Q. You went into that car to take a sleep, you say?

A. Yes, sir.

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Q. Had you had a sleep the night before?

A. No, sir. I didn't sleep much the night before.

Q. Where were you?

A. I was around Fargo.

* * * * *

Q. Had you no regular boarding place, then?

A. No, sir.

* * * * *

Q. Had you no regular room anywhere to sleep?

A. No, sir. I hadn't been here long. * * *

Q. Had you stopped at the same place any two nights?

A. I stopped there at the Bramble House, I think it was, one night.

Q. Which night—the first night you came?

A. I think so; yes, sir.

Q. Where did you stop the next night?

A. No, sir; I made a mistake. The first night I didn't sleep any at all.

Q. Where were you?

A. I was going round Fargo and Morehead.

* * * * *

Q. Had you been drinking pretty freely that night, also?

A. Yes, sir. Was drinking a little before I went into the car.

Q. Pretty much intoxicated, were you not, when you went into the car?

A. Well, not so very bad. It was more from the loss of sleep than anything else.

* * * * *

Q. Do you say there was two men came into the car together?

A. Yes, sir; two men.

Q. Who was the other man besides Mr. Fields. Do you know?

A. I couldn't distinctly see him at the time. I know there was two men came into the car.

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Q. Did they come in after you was awake?

A. No, sir. They came in before I was waked up.

Q. When you woke up you saw them both in the car?

A. Yes, sir. They came up and waked me up.

Q. You say that you had your eye injured by a bar in the hands of Mr. Fields. Did you see that bar in his hands?

A. No, sir. I didn't see anything. I don't know what it was that I was struck with.

Q. Did you see anything in his hands when you first woke up?

A. No, sir.

Q. Did he have anything in his hand when you first saw him?

A. I didn't see anything at all, sir. He wouldn't give me time to put my shoes on.

Q. Well, you woke up and sat up in the corner of the car first, did you?

A. Yes, sir; sat up and looked at him, and asked him if I could put my shoes on.

Q. Was he standing up very close to you?

A. Yes, sir; they came on one behind the other.

Q. You didn't see anything in the hands of Mr. Fields, or any one else? Didn't see them have anything in their hands?

A. No, sir; I didn't.

Q. They waited long enough, you say, for you to put on one shoe?

A. Yes, sir.

Q. Then he seized hold of your legs, you say?

A. Yes, sir.

Q. Did he use both hands in taking hold?

A. Yes, sir; I think he did.

Q. Did both of them seize hold of you, or only one?

A. Only one.

Q. What was the other doing?

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A. He kept right behind this other fellow all the time.

Q. Kept right behind him?

A. Yes, sir.

Q. Seized hold of you with both hands?

A. Yes, sir.

Q. You didn't see him have anything in his hand at that time?

A. No, sir; I did not. I thought it was a knife he had in his hand—something—the blow came so quick.

Q. Did you see him when he seized hold of you, as you say—did he lay anything down on the floor?

A. Not that I seen.

Q. You didn't see him lay anything down or pick anything up?

A. I didn't see him lay anything down on the car after he woke me up.

Q. You didn't see anything at all in his hands?

A. I didn't see anything; no, sir.

Q. After you say he dragged you towards the door by the feet, he then let go of you, did he?

A. Yes, sir.

Q. And you raised up, or got pretty near up on your feet?

A. I was getting upon my knees, like; when I got pretty near straightened up in front of him, I got the blow—the blow came so quick.

Q. Did you see the motion of the arm or anything coming towards you?

A. I could not tell; I thought the hand was drawn back that way.

Q. You thought it; did you see it?

A. I didn't see it distinctly; I hadn't been hardly wakened up at the time.

* * * * *

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Q. The shove was from the same man you must have got the blow from?

A. Yes, sir.

Q. Did you see him put his hands on to you to push you out, or did you simply feel him?

A. I saw him raise the left hand like this to give me a shove.

Q. Did you see his right hand at that time?

A. No, sir.

Q. You didn't see any instrument in his hand, then, at any time, and didn't know what it was that hit you in the eye?

A. No, sir; I didn't know what it was. I got the blow. I thought at first it was a knife—something of that kind—that I got stabbed. The blow came so quick I couldn't tell what it was.

Q. You were pretty well intoxicated at that time so as to be somewhat stupid?

A. Well, sir, I had been drinking a little before I went in there.

Q. Had you got thoroughly waked up so that you realized where you was?

A. No, sir; I hadn't.

Q. You didn't realize where you were?

A. No, sir; I didn't know whether it was in a hotel or out in the street when I was wakened up by them.

* * * * *

Q. You say after you was thrown out of the car you fell on your back?

A. Yes, sir.

Q. How soon was it before you aroused up to consciousness enough to realize where you were?

A. Well, it was about five or ten minutes, I suppose.

Q. Now, you say these men jumped out the other side of the car and ran away?

A. Yes, sir.

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Q. How is it you knew that fact when you were in that stupid sort of condition, and your eye hurt so that you couldn't see out of that eye?

A. I know they didn't jump out on that side; as soon as I realized myself I could see.

* * * *

Q. They both ran, did they?

A. Yes, sir. I don't know whether they ran or walked, or what; I know they got out on the other side of the car.

Q. Do you mean to state positively and distinctly you saw them run away after they got out of the car?

A. No, sir; I wouldn't swear to anything of the kind.

Q. Did you see them go away at all?

A. I saw them go out the other side of the car.

Q. That is all you saw of them?

A. That's all.

Q. Don't know where they went; whether they walked or ran after they got out?

A. No, sir; I wouldn't swear where they went to.

* * * *

Q. Do you know which one of the two men it was—whether it was this Mr. Fields or the other man that hit you in the eye?

A. I couldn't swear positively to it; I couldn't swear positively to either of them.

Q. Do you know which one it was that shoved you out of the car?

A. It was the man with light whiskers.

Q. Mr. Fields?

A. Yes, sir.

Q. You don't know which one it was that hit you in the eye?

A. No, sir. I judge it was the one who stood in front of me.

* * * *

Richard Fields, for the defendant, testified as follows: I had two

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men working on the next car to this same box car, on the same track; was going along the track; these two men looked into the car; Mr. Van Horn says, "There's a man sleeping here;" I came down immediately and attempted to go in there; this little bar we use for a tool in repairing cars right along was standing outside of the car—it was about ten feet north of the door—and I never placed any confidence in any of the men who was around there, because they used to be around there ten and twelve at a time; I picked this bar up so that, seeing their actions before that, I didn't know but what he would pick that bar up and strike me with it; I picked up the bar and jumped into the car; this man was laying asleep in there—some man was; I suppose it was this man; I waked him up; he looked up at me and laid down again; then I shook him up a little livelier; after that he got right up; he looked right at me, and then he looked right at my feet; I saw at once what he intended to do; I had the bar—about two feet and ten inches long; I had my right hand in the center of it; I stepped back far enough so that he missed me, and his head came right against the bar; at that time Mr. Van Horn—he wasn't in at the time—came in and pushed him right out of the car. * * *. He made motions as if he was going to catch me by the feet to tip me over, and he made an attempt to do so. * * *. I stepped back far enough so that he missed me, and hit his eye against that bar.

Q. You had that bar in which hand?

A. Left hand. * * *. I had hold about the center of it; diamond-pointed bar at one end, chisel-point at the other.

Q. At the time he sprang forward and shoved his head against the bar, as you say, did he say anything?

A. He said, "Oh, my eye!"

Q. Did you know, then, that he was hurt—seriously injured—or anything about it?

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A. Mr. Van Horn jumped in the car just about the time he saw him pitch for me, and ketched him and threwed him out doors; I knowed the bar hit him somewhere; I didn't know where; I heard his exclamation. * * *.

Q. Did you strike him with the bar?

A. No, sir.

Q. Did you raise it at all to strike him?

A. No, sir.

Q. Did you strike him with your hand, or strike him at all?

A. I did not strike him at all; made no attempt to.

Q. What was his condition as to being intoxicated, so far as you could judge?

A. As far as I could judge he was intoxicated.

Q. Did he appear in a stupid sort of a condition?

A. Well, not a very stupid condition, but he was in a pretty intoxicated condition. * * *.

Q. Did Van Horn strike him?

A. Not as I know of. * * *.

George Van Horn, a witness on the part of the defendant, agreeing with the defendant substantially to the time they entered the car, then testified as follows: I opened the door on the south side; Mr. Fields got into the door on the south side; he shook this man up.

Q. Did you get into the car at the same time?

A. No, sir. This man raised up and looked at him, and laid down again; Mr. Fields shook him again, and he got right up on his feet and looked at him, and made a dive for his feet; when he made a dive for Mr. Fields I jumped in the car.

Q. That moment you jumped in the car?

A. Yes, sir. Caught him by the collar and shoved him out of the south side door. * * *. On the north side; we got out on the south side.

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Q. Did you see this bar in the hands of Mr. Fields while he was in the car?

A. Yes, sir.

Q. Did Mr. Fields strike him with the bar, or raise it, or make any motion towards striking him?

A. No, sir; I did not see Mr. Fields raise the bar in any shape.

Q. Then did you know he had received an injury at the time you shoved him out?

A. No, sir; I did not. * * *.

Q. Did Mr. Fields strike him with the bar, or punch at him with it?

A. No, sir; I couldn't say, sir, to that—I didn't see him move his hand one way or the other.

* * * * *

No claim is made for damages except what resulted from the injury of the plaintiff's eye. The record is silent as to any other damages.

We are not unmindful that this court has decided that the verdict of a jury should not be disturbed, nor the findings of a court upon a question of fact, the evidence being conflicting, and will not be unless great injustice seems to have been done, or there is an entire want of evidence to sustain it: *Vide, Caulfield et al v. Bogle*, 2 Dak., 464; *Moline Plow Co. v. Gilbert et al*, N. W. Rep., Vol. 15, No. 1, p. 1, (Ante, p. 239.) This also has been the general current of the decisions of the courts in this country, except when the statutes of states have controlled them.

In this case there is not sufficient affirmative evidence to sustain the verdict. The plaintiff could not identify the tool that injured him; he thought it was a knife that the defendant had in his hand; he didn't see anything at all in his hands; he didn't see him raise his hands; he didn't know whether it was his arm, or

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what it was; couldn't distinctly see; didn't see any motion; something struck him in the eye.

Without taking time to criticise the condition the plaintiff admits he was in, giving him full scope of all his physical and intellectual powers, and full credit for truthfulness, it cannot be ascertained from what his testimony discloses, that the defendant or any other person present, when the injury happened, inflicted it; nor from it does it appear what instrument came in contact with his eye. And if it were not for the testimony of the defendant that "he" (the plaintiff) "made a motion as if he was going to catch me by the feet to tip me over, and he made an attempt to do so," * * * and "I stepped back far enough so that he missed me and hit his eye against that bar," it would yet be a matter of conjecture just how the accident occurred. The defendant further testified, that he did not strike him with the bar, nor his hand; and made no attempt to do so. In relation to all which he was corroborated by Mr. Van Horn, and not contradicted by the plaintiff.

The modern rule of the Supreme Court of the United States in relation to the power of the Court to direct the verdict, is thus: When the Judge is clear of doubt that a verdict ought to be rendered either for the plaintiff or the defendant, and that it would be his duty to set a contrary one aside, he ought to instruct the jury so to find. On the other hand such a direction cannot properly be given to the jury, unless the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly: *Orleans v. Platt*, 99 U. S., 677; *Pence v. Langdon*, id. 578; *Commissioners v. Clark*, 94, id. 278, 284; *Hendrick v. Lindsay*, 93, id. 143.

Again, it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient

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to support or justify a verdict in his favor. Not, whether on all the evidence the preponderating weight is in his favor—that is the business of the jury; but, conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial: *Pleasants v. Faut*, 22 Wall., 116, 121, 122.

There being a want of evidence to support the verdict, and no conflict thereof so far as it relates to the grievance complained of, the judgment of the court below is reversed, and a new trial

ORDERED.

All the Justices concurring.

NATHAN MYRICK V. ROSE A. BILL, ET AL.

1. **CLAIM AND DELIVERY: DEMAND BEFORE SUIT: WHEN UNNECESSARY.** Where the plaintiff's right to recover is contested by the defendant upon a claim of superior right, the defendant cannot set up a want of demand as a reason for his failure to surrender the property in controversy. Defendant therefore cannot claim ownership, and still defeat the plaintiff's action for want of a demand.
2. **FIXTURES: MAY BECOME PERSONAL PROPERTY, WHEN.** The parties concerned may, by agreement in due form, give to fixtures the legal character of realty or personalty at their option, and the law will respect and enforce their understanding, whenever the rights of third parties will not be prejudiced.
3. **PRACTICE: AVERMENTS AND ADMISSIONS IN PLEADINGS: ESTOPPEL BY.** A defendant is not at liberty to raise an issue which he has closed by admissions or averments in his answer, nor can one who explicitly admits or avers by his pleading that which establishes plaintiff's rights, be permitted to deny the existence of the fact so admitted or averred, or to prove any state of facts inconsistent therewith.

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4. ANCESTOR'S DEED: WARRANTY: BINDS HEIRS. One who sells personal property as his own thereby warrants that he has a good and unincumbered title thereto, and the heirs of a decedent cannot be heard, for the purpose of defeating their ancestor's deed, to say that he did not in fact own the property described in the deed, or that it belonged to a third party by whose deed it was conveyed to and became the property of the ancestor subsequently to the ancestor's deed.
5. HOMESTEAD: SOME ESTATE IN LAND ESSENTIAL TO. To support a claim of homestead some estate in land is essential. There can be no homestead right in a building alone, apart from the land on which it stands. Hence the wife's signature is not necessary to the validity of a conveyance of buildings owned and occupied by grantor and his family, but situated upon land in which the grantor had no interest or estate at the time of such conveyance.

Appeal from the District Court of Stutsman County.

White & Hewit, for plaintiff and appellant.

W. E. Dodge, for defendants and respondents. No briefs on file.

The facts are stated in the opinion.

CHURCH, J.—This was an action of claim and delivery, brought to recover possession of two buildings in Jamestown, D. T., one of which was a dwelling house and the other a store connected therewith.

The plaintiff claims these buildings by virtue of a bill of sale thereof from one Henry C. Miller, dated October 19, 1878, by the terms of which Miller, in consideration of \$1,000, the receipt of which is acknowledged, "grants, bargains, sells and releases to the "party of the second part" (the plaintiff) "his heirs and assigns "all his right, title and interest" to the property in question.

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The defendant, Rose A. Bill, was formerly the wife of Miller. The answer, after a general denial of the ownership or right of possession of the plaintiff, avers:

1. That these buildings are fixtures upon the land whereon they rest.

2. That on October 19, 1878, they were owned, possessed and occupied by Henry C. Miller, who continued to own and occupy them until his decease, in the spring of 1879; that the land upon which said buildings were, and at all times have been situated, was sold and conveyed by deed of warranty, under seal and of date May 14, 1879, and executed and delivered by the Northern Pacific Railroad Company, a corporation, to the said Henry C. Miller, by virtue of which deed said land became the property of said Henry C. Miller, his heirs and assigns forever; and that on the decease of said Miller, in the spring of 1879, the said land and buildings succeeded to the said Rose A. Bill (then Miller) as his widow, and — Miller, his only surviving child, who ever since have owned, possessed and occupied said property by virtue of the title and possession aforesaid.

There was a general verdict for the defendants.

Several errors are assigned, of which we shall notice only those which seem essential to a proper disposition of the case. And, *first*, as to the necessity for a demand before suit is brought.

The rule which requires a demand is a technical one. The reason of it is that the law presumes that the party in possession of property not his own will respect the rights of the true owner when informed of them, and that upon demand being made he will surrender without suit. But where the defendant claims to be the owner of the property, he ought not to be permitted to set up such claim and thus defeat a recovery by the plaintiff, under the pretense that he would have surrendered the property had he been requested so to do.

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Where the circumstances are such as to show that a demand would have been unavailing no demand is necessary: *Shoemaker v. Simpson*, 16 Kan., 43; *Simpson v. Wrenn*, 50 Ill., 224; *Smith v. McLean*, 24 Iowa, 322; Wells on Rep., Secs. 345-349-374; and where, as in the present case, the plaintiff's right to recover is contested by the defendant upon a claim of superior right, the defendant cannot set up a want of demand as a reason for his failure to surrender. If he desires to rely upon the omission to make demand, he should show a willingness to surrender upon proper demand made: *Homan v. Laboo*, 1 Neb., 207; and in such case it is at least extremely doubtful whether any further penalty than costs ought to be visited upon plaintiff.

No demand was necessary in this case, and the Court having instructed the jury, that unless they could find from the evidence that a demand was made before suit was brought they must find for the defendant, the error is sufficient to require a reversal of the judgment; but since other questions presented by the record are of general interest and are properly before the court, and in the event of a new trial will have a controlling influence upon the result, we deem it our duty to consider them.

The respondents in their brief submitted to the court insist that these buildings were fixtures and as such not the subject of replevin, or an action of claim and delivery under the statute; and the appellant, with equal earnestness, contends that they did not possess the statutory character of "buildings permanently resting upon land," but it is not necessary to go into an extended discussion of this point since we think the law was stated with substantial correctness by the District Judge, as follows: "Ordinarily a building placed upon land is a fixture, becomes part of the real estate and passes with it; but the buildings may be personal property under some circumstances. Parties are at liberty to

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“make any agreement or arrangement with regard to their property,
“to dwelling houses or any other property that they see fit, and if
“the agreement is such a one as will make the property personal
“property, as between those parties it is personal property, and
“may be so treated.”

Judge Cooley states the rule substantially in these words: “The
“parties concerned may, by agreement in due form, give to fixtures
“the legal character of realty or personalty at their option, and
“the law will respect and enforce their understandings whenever
“the rights of third parties will not be prejudiced. Thus a house,
“constituting part of the realty, may be mortgaged or sold sep-
“arate from the land, and the mortgage or sale be perfectly valid
“if made in such form as to be sufficient under the Statute of
“Frauds.” * * *: Cooley on Torts, Secs. 427-430; 2 Smith’s
Lead. Cases, 4th Am. Ed., 219; Wells on Rep., Sec. 61; *Cochran*
v. Flint, 57 N. H., 514, (p. 544); *Russell v. Richards*, 1 Fair-
field, 429; 2 id., 371; *Smith v. Benson*, 1 Hill, 178.

Now, the appellant, as before stated, claims title to this property under the bill of sale referred to, and insists that by the execution and delivery of that instrument, Henry C. Miller, the vendor, gave to these buildings the legal character of personalty, and we think that under the law as above stated, such should be held to be its effect, in so far as it is operative for any purpose in this action. It becomes necessary to determine, therefore, the extent of its operation.

The defendants by their answer aver that on the date when this bill was executed said buildings were “*owned, possessed and occupied*” by Miller. Upon the trial, however, and in the brief of counsel on this appeal, it was insisted on behalf of the defendants, that at the time these buildings were erected the land belonged to the railroad company, and that the buildings thereupon became

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the property of the company, and Miller at the time of the sale to appellant did not own them and could not convey any title to them, but that by the subsequent conveyance of the land by the railroad company to Miller, and Miller's decease intestate, the land and buildings passed by succession to the defendants as Miller's legal representatives.

The obvious objection to this insistent is, that not only is this defense not set up in the answer, but on the contrary as already shown, the defendants expressly aver that Miller was the owner of the buildings at the time of the sale. We have not overlooked the allegations of the answer upon which the defense just indicated is supposed to be based, but it is sufficient to say that the averment of Miller's ownership is in no wise inconsistent with the other facts alleged.

Even assuming that the land was ever owned by the company—an assumption not indeed required or perhaps warranted by any allegation of the answer—Miller may, nevertheless, have been the owner of the buildings, and against the pleader this allegation of the answer must be taken as true, and it must be conclusively presumed that at that time Miller did in fact own these buildings. But with this allegation and presumption, the present contention of the defendants is entirely inconsistent.

A defendant is not at liberty to raise an issue which he has closed by admissions (and *a fortiori*, by averments) in his answer, nor can one who explicitly admits or avers by his pleading that which establishes plaintiff's right, be permitted to deny the existence of the fact so admitted or averred, or to prove any state of facts inconsistent therewith: Whart. on Ev., Sec., 1110; *Paige v. Willet*, 38 N. Y., 28.

Moreover this insistent is opposed to and is in denial of Miller's own deed. By section 1005, of the Civil Code, one who

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sells personal property as his own, thereby warrants that he has a good and unencumbered title thereto. Possession of personal property by a vendor is ordinarily equivalent to an affirmation by him of his ownership thereof: Story on Sales, Sec. 367; *McCoy v. Archer*, 3 Barb., 323. And the defendants cannot now be heard for the purpose of defeating Miller's deed, to say that he did not in fact own this property, or that it belonged to a third party, by whose deed it was subsequently conveyed to and became the property of Miller. Miller certainly could not set up such a defense, even if properly pleaded. As the answer now stands, it does not appear by it that the railroad company ever had any legal interest in these buildings; and if they had, their deed ought, in equity and good conscience, to operate in effectuation of Miller's conveyance to plaintiff, and not to defeat it. Nor have the defendants in this respect any better right. Their title is only such as fell to them from him upon his decease.

The case of *Smith v. Benson*, 1 Hill, 176, was quite similar in principle to this. Ladd, in possession of buildings used as grocery and dwelling upon leased ground, erected under an agreement with the landlord for their removal, mortgaged them to Smith and then sold out to Benson, selling these buildings subject to the mortgage. Subsequently Benson procured a lease directly from the landlord, and upon demand made by Smith for the possession of the buildings, after default in payment of the mortgage debt, refused to surrender, whereupon Smith brought an action of trover. Some suggestion appears in the case of a recognition by Benson of Smith's title, but it does not seem to have entered into the determination of the case. It was held:

1st. That trover would lie.

2d. That defendant, deriving title to the buildings from the mortgagor was not at liberty to insist, as against the mortgagee, that they were part of the freehold; nor,

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3d. To dispute the title of the mortgagor.

See, also, *Lacustrine Fertilizer Co. v. Lake Guano Co.*, 19 Hun, 47; *Dazell v. Odell*, 3 Hill, 219; *Sherman v. Champlain Trans. Co.*, 31 Vt., 162; 2 Smith Lead. Cases, 7 Am. Ed., pp. 626-805. It must undoubtedly be held, therefore, upon this branch of the case, that Miller intended by this bill of sale to transfer the buildings as personal property to the plaintiff, and that such was its legal operation and effect.

It follows that the learned Judge erred in admitting any evidence designed to prove that Miller had no license from the railroad company for the erection of these buildings. Such evidence could only be relevant as tending to show that Miller was not the owner of the buildings at the time of the sale, and for that purpose it was, as we have seen, improper.

It also follows from what has been stated that there was error in submitting to the jury the question of the legal character of these buildings as personalty or fixtures; that should have been determined by the court as matter of law in favor of the plaintiff.

The remaining assignment of error which we shall notice relates to the charge of the Court upon the subject of homestead, it being contended by the defendants that these buildings constituted the homestead of Miller, and therefore that the wife's signature was necessary to the validity of the bill of sale.

Upon this point, after citing the statutory definition of what may be embraced in a claim of homestead, and the provision requiring the signature of the wife to any conveyance thereof, the Court instructed the jury as follows: "I have no hesitation in saying, that buildings owned and occupied by a man and his family constitute his homestead, although the land on which the buildings stand is only a leasehold estate; and although he is but a tenant at will upon the land, the buildings may be a home-

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“stead, although he has squatted upon the prairie and has built a house of any kind, however cheap or however expensive, that is his homestead.”

It was not pretended that at the time the bill of sale was executed Miller had any right or title to or estate in the land on which these buildings were situated, and the rule seems to be well settled that while a very limited estate in the land, perhaps a mere leasehold interest, may be sufficient to support a claim of homestead, some estate in the land is essential. There can be no homestead right in a building alone, apart from the land on which it stands: Smith on H. and E., Secs. 112-113; Thompson H. and E., Secs. 165-7; *Brown v. Keller*, 32 Ill., 152; 25 ib., 610; *Davenport v. Austin*, 14 Ga., 271.

Without considering therefore, and expressing no opinion upon the question whether this claim could properly be set up under the answer filed, we think the Court erred in its instructions to the jury upon this point, or rather in submitting the question at all to the jury, since there was nothing in this branch of the case for them to pass upon. The judgment must be reversed and a new trial

GRANTED.

MAY TERM, 1884.

PRESENT:

HON. ALONZO J. EDGERTON,	CHIEF JUSTICE.	
HON. SANFORD A. HUDSON,		} ASSOCIATE JUSTICES.
HON. WILLIAM E. CHURCH,		
HON. CORNELIUS S. PALMER.		

CASSELMAN V. WINSHIP.

1. **LIBEL: PLEADING: WORDS NOT ACTIONABLE PER SE.** A direct charge of perjury is actionable per se, but the words, “He made false affidavits in order

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to commence his case," or "the affidavit made by Mr. C. was false," are not actionable per se, nor can an action be maintained upon them merely by an innuendo that they purported or were intended to import perjury. There should be a colloquium of a judicial proceeding, and the nature of the proceeding and the matter to which the oath was taken, should appear to have been material to the proceeding and before an officer authorized to administer an oath.

Appeal from the District Court of Grand Forks County.

Demurrer to complaint.

E. St. Julien Cox, for appellant. Points and authorities in brief:

The words set out in the complaint are libellous, and even the caption of the article is libellous: Civil Code, 210, Secs. 29-30, Sub. 3; *Pratt v. Pioneer Press Co.*, 14 N.W. Rep., 62; 4 Wis., 231-37; 7 ib., 462; 9 ib.,—; 28 ib., 138; 36 ib., 513; 32 ib., 106; 23 ib., 105; 47 ib., 659; 3 N.W. Rep., 392; 10 ib., 81-415-602; 9 ib., 43; 12 ib., 177; 13 ib., 776; 47 Cal., 252; 41 Cal., 364.

Cyrus Wellington and *Bozard & Clifford*, for respondent. No briefs on file.

HUDSON, J.—This action was brought against the defendant, who was the publisher and proprietor of the *Daily Herald*, a newspaper published in the city of Grand Forks, for libel, in the publication of the following article:

"ALLEGED CROOKEDNESS: Legal circles were somewhat agitated yesterday over the fact that Charles White, a settler whose claim was contested, charges J. P. Casselman, the attorney who contests the claim in person, had made false affidavits in order to commence his case. He also asserts that the affidavit made by

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“ Mr. Casselman was false. Charles Morgan, a brother of Howard Morgan, has a similar story to tell, and prefers like charges. Of course these charges are by no means proven, and Mr. Casselman’s affidavit stands against the unsupported word of the others. It is to be investigated, and in case the charges are found true, the legal gentleman will be debarred from practice in the U. S. land courts.”

The complaint alleges that the plaintiff was, and for a long time had been, an attorney, and as such, and in consequence of the publication of these false and defamatory words, has been and is, greatly damaged, injured and prejudiced in his name, character and reputation, and has lost and been deprived of great gains and profits in his calling, following and occupation, which would have otherwise arisen and accrued to him in his business, calling and profession, to his damage, etc.

The defendant, by his counsel, demurred to this complaint, alleging as grounds of demurrer, that the complaint did not state facts sufficient to constitute a cause of action, in that the publication in the said complaint alleged to have been made by the defendant, was not a libel. The court sustained the demurrer, and from the judgment entered upon the order sustaining the demurrer, the plaintiff appeals to this court.

The learned counsel for the plaintiff, by a colloquium and by innuendo, alleges that the intention of the defendant was to charge the plaintiff with having been guilty of the crime of perjury, in making false affidavits before the United States Land Office, in the contesting of claims before the same.

A direct charge of perjury is actionable *per se*, and “ if such a direct charge had been made,” we should have had little difficulty in holding the complaint in this case sufficient to warrant a recovery; but the words, “ He made false affidavits,” or “ The affidavit

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made by Mr. C. was false," or "He swore a false oath," or "He swore a lie," are not actionable *per se*, nor can an action be maintained for them, merely by an inuendo that they imported or were intended to import perjury: *Schmidt v. Witherick*, 12 N. W. Rep., 448. There must be a colloquium of a judicial proceeding and the nature of the proceeding: *Townshend on Slander and Libel*, 244. And it must appear that the matter involved was material. The charge of perjury as respects matter which is immaterial to the issue involved, cannot in any event, or under any circumstances, be actionable; it cannot be determined from the words complained of in this case, what kind of a claim was contested, or when or before whom the affidavit was made that is said to be false; whether it was taken before any officer or tribunal that had authority to administer an oath, or whether the matter therein stated was material to any investigation, and there is no colloquium referring the words to the conduct of the plaintiff as a witness or in any other capacity wherein an oath or affidavit was legally required, except it was before the United States Land Office, in the contesting of claims before the same. This is too general and indefinite.

If the charge is of false swearing before a particular court or tribunal, or in a particular proceeding, naming it, the charge is actionable, if the court named is one authorized to administer an oath, or if the proceeding named is a judicial proceeding.

The publication complained of, not being actionable *per se*, malice cannot be inferred, nor is it alleged that it was a false publication to the knowledge of the defendant; but when the article is taken as a whole it appears conclusively that its publication was not malicious. It does not purport to state any facts within the knowledge of the defendant, nor that he believed the statements charging the plaintiff with crookedness were true. It is a statement of something that another person had said. The writer does not adopt it as his own assertion, but the statement appears to have

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been made entirely as the language of another, and to deprive it of all appearance of malice, the writer follows it up with the remark that * * * * these charges are by no means proven, and that Mr. Casselman's affidavit stands against the unsupported word of the others, clearly showing that the writer did not believe them to be true, and did not put them forth as such.

From the view we take of this publication, we think the District Court committed no error in sustaining the demurrer in this action and the judgment is,

AFFIRMED.

All the Justices concurring.

GRADY V. BAKER.

1. SALE OF MERCHANDISE: CHANGE OF POSSESSION: VENDOR EMPLOYED AS SALESMAN: NOT PER SE EVIDENCE OF FRAUD. After the sale of goods, and an actual and notorious change of possession, the employment of the vendor in the capacity of mere salesman or clerk, is not per se, conclusive evidence of fraud.
2. VENDEE: MAY BE IN POSSESSION BY AGENT: VENDOR MAY BE SUCH AGENT. The vendee, under section 2024 of the Civil Code of this territory, need not remain in personal possession, but may be so by agent; and such agent may be the seller of the property, "if the possession be such as to advise the creditors of the change in the title of the property."

Appeal from the District Court of Yankton County.

Michael Grady was doing business as a merchant tailor at the city of Yankton. His stock was mortgaged to a creditor for \$1,000, and he owed plaintiff, Robert G. Grady, his son, the sum of \$500. On January 26, 1881, plaintiff, Robert G. Grady, purchased the stock of goods from his father for \$1,987.11, assumed

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the \$1,000 mortgage, cancelled his father's indebtedness of \$500, and paid over to his father in cash the balance of \$487.11 to cover the value of the stock. The son then took down his father's old sign and erected his own as "Robert G. Grady, Merchant Tailor," took a new lease of the store in his own name, and re-employed part of the former workmen, who had been paid off and discharged by Michael Grady at the time of the sale. Plaintiff also employed his father as "cutter" and salesman in the shop at \$75 per month, and Mrs. Cary, his sister, as book keeper, and one Doyle, who worked in the shop and had charge of the general business, and all moneys collected and paid out. The goods in the shop were attached by creditors under four warrants of attachment, between February 7 and 11, 1881, and plaintiff brings claim and delivery against the sheriff to recover possession. Jury trial was had and verdict for plaintiff for possession and \$121.65 damages. Defendant appeals. On the trial the defendant requested the following charge to the jury: "If the jury shall find that Michael Grady retained control of the goods alleged to have been sold, either conjointly with the purchaser or his agents, or as agent of the purchaser, there is no actual and continued change of possession within the meaning of the statute, such as will prevent the presumption of fraud;" which was refused, and the refusal is assigned as error. The other facts appear in the opinion.

C. J. B. Harris and *L. B. French*, for appellant. Points and authorities in brief:

Every transfer of personal property unaccompanied by an immediate delivery, and followed by an actual and continual change of possession, is conclusively presumed to be fraudulent and void as against creditors or incumbrancers in good faith: Sec. 2024, Revised Codes, 466; *Watson v. Rogers*, 53 Cal., 402; *Regli v. McClure*, 47 Cal., 612; *Woods v. Bugbey*, 29 Cal., 467.

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The Court erred in refusing to charge as requested by defendant. If the said Michael Grady retained possession or control of the goods alleged to have been sold either by himself or conjointly with another, then there was no actual and continued change of possession within the meaning of the statute: *Allen v. Massey*, 17 Wall., 353; *Clafflin v. Rosenberg*, 42 Mo., 439; *Osen v. Sherman*, 27 Wis., 501; *Van Pelt v. Littler*, 10 Cal., 394; *Weil v. Paul*, 22 Cal., 493; *Miller v. Gorman*, 69 Pa. St., 134.

Change of possession must be open and notorious so as to be apparent to all the world: *Engles v. Marshal*, 19 Cal., 329; *Godcheaux v. Mulford*, 26 Cal., 326; *Woods v. Bugbey*, 29 Cal., 472; *Lay v. Neville*, 25 Cal., 553; *Allen v. Massey*, 17 Wall., 353; *Clafflin v. Rosenberg*, 42 Mo., 439.

Bartlett Tripp, for respondent. No brief on file.

EDGERTON, C. J.—This is an action brought by the plaintiff to recover possession of certain goods attached by the defendant, as sheriff, at the instance of certain creditors of Michael Grady. The plaintiff claims to have bought the goods of Michael Grady, and to have paid a full consideration therefor. The creditors claim that the sale was fraudulent and void under section 2024 of the Civil Code.

It is not contended that the sale was not *bona fide* in fact, and for a full and adequate consideration; but it is contended that there was no such actual and continued change of possession as took the case out of the statute.

There are three assignments of error, all relating to the charge of the Court. The charge of the Court is not set forth in the record, and this court has no knowledge of what such charge was, except as to the fragments excepted to by counsel.

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The first exception is to that portion of the charge, given upon the Judge's own motion, in which he announces the rule that a vendee, under our statute, need not remain in actual possession, but may do so by agent, and such agent may be the seller of the property, "*if the possession be such as to advise the creditors of the change in the title of the property.*"

This charge, with the qualification and limitation attached, as to the public, open and notorious character of the possession, states the law accurately.

The statute does not mean, that if, by any accident or chance, the property purchased shall come into the hands of the original owner, the creditors of such former owner may seize the property to the injury of *bona fide* owners and purchasers. It does not mean that the purchaser of a stock of goods may not employ the former owner as a mere clerk or salesman. It means that the sale shall be open and public, that the world may be apprised of the change of ownership.

The change of possession must be actual and continued, and not subject to some secret trust between the seller and buyer. If such is the character of the possession, the statute is satisfied and the sale will not be avoided.

"The employment of the vendor by the vendee after the sale, may be proved as a fact tending to show that there has been no actual or continued change of possession; but when proved it does not become conclusive of the question, but only an element of proof to be weighed by the jury.

"After a sale of goods and chattels, and an actual change of possession, the employment of the vendor by the vendee, in the capacity of a clerk or salesman, is not, *per se*, a conclusive evidence of fraud which admits of no explanation. After a sale of goods and chattels in good faith, and an actual and notorious

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“ change of possession, the employment of the vendor by the vendee as a mere clerk or salesman, is not a fraud which vitiates the sale, because the change of possession is not continued: 26 California, 317.”

The whole law of the case is stated carefully and clearly in the fragments of the charge before this court. The employment of Michael Grady by the plaintiff after the sale, was a fact to go to the jury with all the other facts, to be by them considered upon the question of whether there was an immediate delivery, and an actual and continued change of possession.

The employment of Michael Grady was not a fraud, *per se*, that could not be explained. It is the fact, that immediately after the sale the former owner is found in such situation of apparent ownership, which is to go to the jury with the other facts, to aid them in determining whether he is such clerk and salesman, or still owner in fact, of such property.

The language of the charge given, is nearly *verbatim* that used by the best adjudicated cases: *Stevens v. Irwin*, 15 California, 506; *Godchaux v. Mulford*, 26 California, 316; *Ford v. Chambers*, 28 California, 13; *Warner v. Carleton*, 22 Illinois, 424; *Stanley v. Robbins*, 36 Vermont, 423.

The request asked by the defendant, if good law in any case, was not applicable to the facts of this case, so far as the facts are before the court; and again, it no where appears, if such charge had been applicable, that it had not already been substantially given, either of which would be good grounds for refusing it.

It appearing that the case was fairly submitted to the jury, upon the facts, the judgment should be,

AFFIRMED.

All the Justices concurring.

Territory ex rel., Graves v. Cole, et al.

TERRITORY EX REL. GRAVES V. COLE, ET AL.

1. **MANDAMUS: RELATOR: WHO MAY BE: NON-RESIDENT OF COUNTY.** Under an act of the Legislature submitting the question of a division of Custer county to the legal voters residing within the proposed boundaries of the new county of Fall River, upon an application by a relator, who was a resident of Lawrence county, for a writ of mandamus to compel the canvassing board to recanvass the vote cast at such election: Held, That such relator was not "beneficially interested," even though owning property in the proposed new county, and was not the proper party to apply for the writ.
2. **SAME: PUBLIC OFFICER MUST APPLY FOR WRIT, WHEN: WHEN PRIVATE CITIZEN MAY BE RELATOR.** When public rights are to be subserved public officers must apply for the writ. But if a private individual make himself relator he must show some particular right or privilege of his own, independently of that which he holds with the public at large as a citizen.

Appeal from the District Court of Custer County.

The facts are stated in the opinion.

G. C. Moody, for defendants and appellants. Points and authorities in brief:

Without showing some property interests which are injuriously affected by a failure of the public officer to act, the citizen of one county cannot interfere in the public affairs of another county in which he has no residence or citizenship. No more than could a non-resident of a state be a relator to compel a public officer of such state to act without showing some peculiar interest: *High's Ex. Legal Rem's*, Secs. 33, 436, 449, 521; *State v. Coms. School Fund*, 4 Kansas, 261; *State v. County Judge of Davis Co.*, 2 Iowa, 280; *Linden v. Board of Supervisors of Alameda Co.*, 45 Cal., 6; *Woods v. Bangs*, 1 Dak., 179; *Babbett v. State*, 10 Kan., 9-16; *Hefner v. Com.*, 28 Pa. St., 108; *People v. Regents*,

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4 Mich., 98; *People v. Greent*, 29 Mich., 121; *Sanger v. Coms.*, 25 Maine, 291; *Chicago v. Building Asso.*, 102 Ill., 379.

The defendants met, acted as canvassers and adjourned. This dissolved the board, and ended its functions. Such a board under our law is not a continuous one, but may be formed by the clerk in several ways, in his discretion: Revised Codes, Chap. 27, Sec. 31.

Again, the time in which the board was authorized to act under the law relating thereto expired long before any demand was made upon them to act or any proceedings instituted: *State v. Rodman*, 43 Mo., 256; *People v. Supervisors, etc.*, 12 Barb., 217, approved in 4 Abb., 85; 15 Barb., 618; 23 Barb., 348; 24 Barb., 167; 29 Barb., 99; 45 Barb., 458; 46 Barb., 261; 30 N. Y., 472.

The act creating the new county of Fall River, submitting the question of the existence of the law to the voters of Fall River county, was void as a delegation of power: *State v. Young*, 29 Minn., 474, 550; *State v. Com. Pleas Morris Co.*, 36 N. J., 72, and cases there cited; S. C. 13 Am. Rep., 422; *State v. Hudson*, 37 N. J., 12; *Barto v. Himrod*, 8 N. Y., 483; *Santo v. State*, 2 Iowa, 203, etc., *Geebrick v. State*, 5 Iowa, 491; *State v. Benneke*, 9 Iowa, 203; *State v. Weir*, 33 Iowa, 134; *Thorne v. Cramer*, 15 Barb., 112, 122; *People v. Stout*, 23 Barb., 349; *Ex-parte Wall*, 48 Cal., 279; *Brown v. Fleschner*, 4 Oregon, 132; *State v. Wilcox*, 42 Conn., 364, S. C., 19 Am. Rep., 536; *Parker v. Coms.*, 6 Barr, 507; *Rice v. Foster*, 4 Har., (Del.) 479; *State v. Elwood*, 11 Wis., 19; *State v. Field*, 17 Mo., 529; *State v. Wilcox*, 45 Mo., 458.

Granville G. Bennett, for respondent.

Where the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, as this

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unquestionably is, the people are regarded as the real party, and the relator need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such is interested in the execution of the laws: High's Ex. Legal Rem's, p. 204, Sec. 441, and note; *County of Pike v. The State*, 11 Ill., 202; *City of Ottawa v. The People*, 48 Ill., 233; *Hamilton v. The State*, 3 Ind., 452; *People v. Collins*, 19 Wend., 56; *People v. Halsey*, 37 N. Y., 344; *State v. County Judge*, 7 Iowa, 186. If he is a citizen of the territory it is sufficient: *Hamilton v. The State*, *supra*. To the same import is the English rule: High's Ex. Legal Rem's, 308, and note.

In the case of the *People v. Halsey*, *supra*, the Court uses the following language: "Inasmuch as the people themselves are the plaintiffs in a proceeding by mandamus, it is not of vital importance who the relator should be, so long as he does not officiously interfere in a matter with which he has no concern. The rule, therefore, as it is sometimes stated, that a relator in a writ of mandamus must show an individual right to the thing asked, must be taken to apply to cases where an individual interest is alone involved, and not to cases where the interest is in common to the whole community."

As to the invalidity of the act creating the new county of Fall River, much stress was laid by counsel on the case of *Barto v. Himrod*, 8 N. Y., 483. This was the case of an enactment by the legislature establishing a public school system for the state, and its validity as a law depended on the vote of the people of the entire state. It was for that reason held unconstitutional. It may not be out of place to remark that this was, as it seems, before the State of New York had any public schools, and that may account for the court distrusting the people. Since then a little light in this regard has dawned on the judiciary of that state, and

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on examination it will be found that its courts have not shown any disposition to extend the doctrine of that case to local and special statutes, which relate to local government and matters of municipal concern: *Bank of Rome v. Village of Rome*, 18 N.Y., 38; *Starin v. Town of Geneva*, 23 N.Y., 439; *Gould v. Town of Sterling*, 23 N.Y., 456; *Clark v. City of Rochester*, 28 N. Y., 605.

The same doctrine is held in numerous other cases, and notably the following: *State v. Parker*, 26 Vt., 357; *in re. Richard Oliver*, 17 Wis., 681; *Smith v. Janesville*, 26 Wis., 291.

In the case of *State, ex rel. Attorney General v. O'Neil*, 24 Wis., 149, the statute under consideration contained the following provision: "This act shall be void, unless the legal voters of the city of Milwaukee, at an annual election, * * * by vote determine to accept the same." A majority of the votes were in favor of the law, and it was held valid. The opinion in this case is able and exhaustive.

To the same effect are the decisions of the Supreme Courts of Iowa and California: *People v. Nalley*, 49 Cal., 479; *Upham v. Supervisors*, 8 Cal., 379; *Santo v. The State*, 2 Ia., 165; *Morford v. Unger*, 8 Ia., 82; *State v. Beneke*, 9 Ia., 203.

In Missouri the question whether a general school law be accepted in a particular municipality was referred to its voters, and the law authorizing such reference sustained: *State v. Wilcox*, 55 Mo., 458; Response to House Resolution, 55 Mo., 295.

The Supreme Court of Illinois holds the same doctrine: *State v. Reynolds*, 10 Ill., 1; *Erlinger v. Boneau*, 51 Ill., 94. Also the State of Mississippi: *Pike County v. Barnes*, 51 Miss., 305. On same point and to same effect, see: *Brunswick v. Finney*, 54 Ga., 317; *Commonwealth v. Judges, etc.*, 8 Pa. St., 391; *Call v. Cladbourn*, 46 Me., 206.

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EDGERTON, C. J.—An act was passed by the last legislature to divide Custer county and to create a new county to be called Fall River, “provided that before this act shall take effect and be in force the matter of the establishment of the proposed county of Fall River shall first be submitted to a vote of the legal voters residing within the territory embraced within the proposed county * * *.” An election was held as provided for in such act, and the county clerk of Custer county, for the purposes of a board of canvassers, called to his assistance two members of the board of county commissioners of said county, and they as such board of canvassers proceeded to canvass the votes cast at such election upon the question of the establishment of the proposed county of Fall River, and declared the result. Thereafter Leonard R. Graves, a resident of Lawrence county, but a tax payer of Custer county, commenced this proceeding as relator to compel the said county clerk, and the county commissioners called to his assistance as a board of canvassers, to reconvene, and recanvass the said vote, claiming that certain votes had been illegally counted in the prior canvass. Whereupon an alternative writ of mandamus was issued. To this writ the defendants demurred and also moved to quash. The writ was held insufficient and defective, and leave given to relator to amend. To the amended alternative writ the defendants again moved to quash and also demurred, upon the ground that neither the said writ nor the said petition therefor state facts sufficient to authorize the issuance thereof or the peremptory mandamus prayed for. *Second*, because it does not appear that the relator is a party beneficially interested. *Third*, because the pretended act of the Legislative Assembly, upon which the proceedings are based, is invalid and void. Which motion and demurrer were overruled and defendants elected to stand thereon, refusing to make other or farther answer. Judgment was had for a peremptory writ, from which defendants appeal, assigning three errors:

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"*First*.—The relator is not a party 'beneficially interested,' and cannot maintain this proceeding as relator.

"*Second*.—The defendants having met and acted as canvassers and adjourned the board was dissolved and its functions ended.

"*Third*.—That the act under which it is attempted to create the county of Fall River is null and void."

The relator was not and is not a resident of Custer county, but resided in Lawrence county. It is contended that he was the owner of property within the limits of the proposed new county of Fall River, and as such "interested." Did this make the relator the proper party to apply for the writ—was he "beneficially interested?" We think not.

To use the language of Judge Woodward: "In order to obtain a writ of mandamus the applicant must have a right to enforce which is specific, complete and legal, and for which there is no other specific legal remedy. When public rights are to be subserved, public officers must apply for the writ; but if a private individual make himself relator, he must show some particular right or privilege of his own, independently of that which he holds with the public at large." 28 Pa. St., 108; see also *Babbett v. State*, 10 Kan., 15; *People v. Green*, 29 Mich., 121; High Ex. Legal Rem., Sec. 436.

It is contended by the respondent that the relator being a citizen was the proper party. The relator was a citizen of Lawrence county but not of the proposed county of Fall River nor of the county of Custer.

The judgment of the District Court must be reversed and the case

REMANDED.

All the Justices concurring.

Larson v. The City of Grand Forks.

LARSON V. THE CITY OF GRAND FORKS.

1. **EXCESSIVE DAMAGES: SETTING ASIDE VERDICT ON ACCOUNT OF: NOT SET ASIDE, WHEN.** The verdict of a jury giving damages for personal injuries should not be disturbed unless it is clear that the damages are materially greater than the evidence will justify.
2. **POWER TO KEEP SIDEWALKS CLEAR OF OBSTRUCTIONS AND ACCUMULATIONS: WHEN ACCOMPANIED BY THE NECESSARY MEANS, CREATES A DUTY.** The mayor and council of the city of Grand Forks have power "to provide for keeping sidewalks clear and clean from all obstruction and accumulation." This power conferred upon the city by the Legislature, together with the necessary means for the proper execution of the power, carries with it the corresponding duty, to keep the streets in a reasonably safe condition, and if it neglect to do so the city will be liable for injuries happening by reason of its negligence.
3. **SAME: THINGS OVERHANGING WALK: PORCH.** This duty is not confined to obstructions upon the walk alone, but also applies as well to every thing hanging over the walk, that may render travel unsafe.
4. **NEGLECTENCE: DEGREE: LACK OF ORDINARY OR REASONABLE CARE.** The general rule is, that in reparation of its highways a municipal corporation is answerable in damages for a lack of ordinary or reasonable care, it being held to the same rule of diligence as private persons in the conduct of any business involving a like danger to others.
5. **NOTICE OF DEFECT IN STREET OR SIDEWALK: WHEN INFERRED.** Notice will be inferred if the defect in the street or sidewalk has existed for a considerable length of time; or from the fact that the defect had existed so long as to render it notorious; and upon such evidence fairly submitted to the jury, the finding will not be disturbed.
6. **CONTRIBUTORY NEGLIGENCE:** If the plaintiff, by any act, contributed to or caused the accident complained of, the defendant would not be liable for damages.
7. **EXEMPLARY DAMAGES: NOT RECOVERABLE IN ACTION AGAINST CITY.** In an action for personal injuries sustained by reason of negligence on the part of the city to keep its streets in a reasonably safe condition, only actual damages are recoverable. Exemplary or vindictive damages are not allowed.

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Appeal from the District Court of Grand Forks County.

The facts appear in the opinion.

W. L. Wilder, for defendant and appellant. Points and authorities:

In order to justify verdict for an amount exceeding actual damages the negligence of the city must be so gross as to be willful: *Chicago v. Kelly*, 69 Ill., 475. The evidence of plaintiff's own negligence is undisputed and cannot be disregarded, and he cannot recover in this action: *Lomer v. Meeker*, 25 N. Y., 361; *Newton v. Pope*, 1 Cow., 109; *Dolson v. Arnold*, 10 How., 528.

The jury cannot arbitrarily and capriciously disregard the contradicted testimony of defendant's own negligence, and when by such testimony a defense is clearly established, the court should non-suit plaintiff, or what is the same thing, dismiss the complaint: 3 Wait's Practice, 159; *Seibert v. Erie Ry. Co.*, 49 Barb., 583; *McMullen v. Hoyt*, 2 Daly, 271; *Lomer v. Meeker*, 25 N. Y., 361.

Contributory negligence defeats plaintiff's right of recovery: *O'Donnell v. M. P. R. R. Co.*, 7 Mo. app. Rep., 190; *Langan v. St. L. I. M. & S. Ry. Co.*, 5 ib., 311; *Leduke v. St. L. & I. M. Ry. Co.*, 4 ib., 485; *Meyer v. Linden R. R. Co.*, 6 ib., 27; *Lovenguth v. Bloomington*, 71 Ill., 238; *Reisk v. Goshen*, 42 Ind., 339; *Covington v. Bryant*, 7 Bush., (Ky.) 248; *Durkin v. Troy*, 61 Barb., 437. There was such plain disregard by the jury, of the evidence and the instructions, that the court should have set aside the verdict: Sec. 289, Code of Civil Procedure.

As to the objects for which a municipal corporation is formed: *Cudden v. Eastwick*, 1 Salk., 192; *People v. Morris*, 13 Wend.,

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325-34; *People v. Hurlburt*, 24 Mich., 44-88; *Jameson v. People*, 16 Ill., 257; *Herbert v. Benson*, 2 La. Ann., 770; *Clark v. Rochester*, 14 How., 193; 5 Abb., 107.

They possess two classes of powers, and two classes of rights, public or governmental, and private or local: *N. O. R. R. Co. v. New Orleans*, 26 La. Ann., 478; 2 Dillon Mun. Corp., 966-7; 2 Thomp. on Neg., 734; *Hill v. City of Boston*, 122 Mass., 334; S. C. 23 Am. Rep., 332. In the exercise of governmental powers the corporation is exempted from financial responsibility: *Conners v. Duckett*, 20 Md., 468; *Wrightman v. Washington*, 1 Black, 39; *Duke v. Mayor of Rome*, 20 Ga., 635; *Pray v. Jersey City*, 32 N. J. L., 415; *Hill v. Boston*, 23 Am. Rep., 332; 2 Thompson on Neg., 731, N. 1, and 734, N. 2.

The duty of the defendant to keep its streets in repair is a governmental one, and the corporation is not liable: *Howard, Ad. v. City of New Haven*, 37 Conn., 475, and 9 Am. Rep. 342; *Taylor v. Peckam*, 5 Am. Rep., 578; *Detroit v. Blakely*, 21 Mich., 84; *McCutcheon, v. Homer*, 43 Mich., 483; *Nevasota v. Pierce*, 46 Tex., 526; *Winbigler v. Los Angeles*, 45 Cal., 36; *Detroit v. Cony*, 9 Mich., 165-84.

In the exercise of private or local powers the corporation is liable for negligence: *Baily v. Mayor, etc.*, 3 Hill, 531; *West. Coll. v. Cleveland*, 12 Ohio St., 375; *Howe v. New Orleans*, 12 La. Ann., 481; *People v. Detroit*, 28 Mich., 228; *People v. Hurlburt*, 24 ib., 44; *Jones v. New Haven*, 34 Conn., 1; *Small v. Danville*, 51 Me., 359.

The conferring of a power to repair streets does not carry with it a duty: *Peck v. Batavia*, 32 Barb., 634. Nor does the power to collect revenue for the purpose change the rule: *Eastman v. Meredith*, 36 N. H., 284; *Hamilton County v. Mighels*, 7 Ohio St., 109; *Bigelow v. Randolph*, 14 Gray, 543; *Hill v. Boston*, 23 Am. Rep., 332.

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Noyes & Woodward, for plaintiff and respondent.

The defendant is a *person*, within the meaning of section 1940 of our Civil Code, which provides that "every person" is liable in damages to one who suffers detriment from the "unlawful act or omission" of another: Civil Code, Sec. 2112.

The duty of defendant is commensurate with its powers: 2 Dillon Mun. Corp. Secs. 1012-13; *Grove v. Ft. Wayne*, 45 Ind., 429; Thompson on Neg., 777; *West v. Linn*, 110 Mass., 514; *Drake v. Lowell*, 14 Met., 292. Defendant is liable for an injury caused by a dangerous awning: *Day v. Milford*, 5 Allen 98; *Pedrick v. Bailey*, 12 Gray, 163. Defendant is bound to make its streets reasonably convenient and safe: Dillon Mun. Corp., Sec. 1013, N.; *Higert v. City of Greencastle*, 43 Ind., 574.

The rotten awning had stood for months on a principal street, in a dangerous condition, and the defendant is properly chargeable with constructive notice of its condition: Thompson on Neg., 762; *Ft. Wayne v. Dewitt*, 47 Ind., 391; *Barrett v. St. Joseph*, 53 Mo., 290; *Harper v. Milwaukee*, 30 Wis., 365; *Todd v. Troy*, 61 N. Y., 506; *Hall v. Fondulac*, 42 Wis., 274; *Market v. St. Louis*, 56 Mo., 189; *Brewster v. Berlin*, 34 Wis., 357; *Crooker v. Chicago*, 2 Bradw., 279.

The question of contributory negligence is one of fact for the jury, with the burden of proof on defendant: Thompson on Neg., 1178; *Jalie v. Cardinal*, 35 Wis., 118-29; *Seigel v. Eisen*, 41 Cal., 109.

The damages awarded are not greater than the evidence will justify, when the permanent character of the injury and the pain and suffering are considered: 39 Wis., 638; 8 Pick., 126; 9 Cush., 231. The judgment should be affirmed.

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EDGERTON, C. J.—The respondent brought an action in the District Court for Grand Forks county to recover damages for injuries received through the alleged negligence of the defendant. Upon the trial of the issue the jury returned a verdict in favor of the plaintiff and respondent for the sum of \$1,300 damages. This verdict was set aside by the District Court and a new trial granted. Upon the second trial the jury assessed the damage in favor of the plaintiff in the sum of \$1,500. A motion was made by the defendant for a new trial, which was denied, and an appeal taken to this court. There are three assignments of error:

First.—That the damages were so excessive that they bear the ear marks of passion or prejudice on the part of the jury.

Second.—That the evidence is insufficient to justify the verdict.

Third.—The Court erred in overruling defendant's motion, at the close of plaintiff's case, to direct the jury to bring in a verdict for defendant, because the facts stated in the complaint were not sufficient to constitute a cause of action; and further erred in refusing, at defendant's request, to charge the jury, "That the city of Grand Forks is not liable."

In reference to the first and second assignments of error the record discloses that the plaintiff, a laboring man, had his leg broken by the fall of an awning overhanging the sidewalk—was confined to his bed in consequence of the same for about six weeks, and then for another six weeks not able to walk about without the use of crutches; that he was obliged to pay his physician and nurses about \$300. There was also testimony offered and received tending to show that the plaintiff had not since the accident been able to perform labor as before, and that the broken leg was shorter than the other in consequence of the fracture, resulting in a permanent injury: See Abstract, pp. 14 to 18.

"The verdict should not be disturbed, unless it is clear that the

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damages awarded are materially greater than the evidence will justify:" 9 Cushing, 228; 8 Pickering, 126; 39 Wis., 640.

The only remaining question is, did the Court err in the charge to the jury? The defendant submitted the following requests, all of which were given by the Court, except the first:

1st. That the city of Grand Forks is not liable.

2d. That if the city be liable at all, it can be only after actual or implied notice brought home to the corporation, and failure to repair or remove the same thereafter; otherwise the jury must find for defendant.

3d. That to charge the city with presumptive notice of the dangerous condition of this porch, it must have been so dangerous, and so apparent to every passer-by, that an ordinarily careful person must have seen and avoided the same. Mere knowledge on the part of a few citizens does not constitute implied notice.

4th. That the plaintiff must come into this court with clean hands, and if he by any act caused, or in any manner contributed to hasten, or was the means of hastening the fall of this porch, then the jury must find for the defendant.

5th. That the act of reaching up and catching hold of one of the supports of this porch, was, if believed by the jury, an act of contributory negligence.

6th. If you find for plaintiff, he is entitled only to actual damages for loss of time and necessary expenses incurred thereby. Vindictive damages cannot be recovered.

7th. That the liability of a city for an injury, caused by a defect in streets, can only arise where the corporation has had notice of the defect, and is guilty of some neglect. Mere existence of a defect does not establish the liability.

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While the weight of evidence may have convinced the defendant or even the Court that the plaintiff contributed to the accident, yet the evidence upon this point is conflicting, and the question was fairly submitted to the jury, and they were the proper judges of the fact.

The mayor and council of the city of Grand Forks have power "to provide for keeping sidewalks clear and clean from all obstruction and accumulation."

This power conferred upon the city by the legislature, together with the necessary means for the proper execution of the same, carries with it the corresponding duty: Dillon on Corporations, Sec. 789.

It is incumbent on the city having full control of the streets therein, and of the improvement thereof, to keep them in a reasonably safe condition; and if it neglects to do so, it will be liable for injuries happening by reason of its negligence: 53 Mo., 290.

The law of the case was correctly given by the Court to the jury. In the charge *inter alia* we find: "The defendant is a municipal corporation, and as such is empowered by its charter, through its officers, to provide for keeping the sidewalks clean and free from obstructions or accumulations, and to take charge of the streets in such city; and it is its duty to see that they are in a condition at all times that people may travel along the walk in perfect safety, and that there should be no obstruction to such travel, and for this purpose it may levy and collect taxes to defray such expenses. This duty is not confined entirely to obstructions upon the walk, but also applies as well to everything hanging over the walk that may render such travel unsafe. If the city officers, or those to whom this duty belongs and to whom it is assigned, neglect such duties, and a person is injured in consequence of such neglect, the city is liable for damages. This is

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“ in conformity to the act of this territory, which provides that
 “ every person who suffers detriment from the unlawful act or
 “ omission of another, may recover from the person in fault, com-
 “ pensation therefor in money, which is called damages.” See,
 also, Thompson on Negligence, 777; 14 Metc., 29.

Was the respondent injured through the negligence of the ap-
 pellant? There was evidence tending to show that the awning
 might have been in a dangerous condition for some time.

“ The general rule is, that in reparation of its highways a munic-
 “ ipal corporation is answerable in damages for a lack of ordinary
 “ or reasonable care, * * * and it is held to the same rule of
 “ negligence which is expected of private persons in the conduct
 “ of any business involving a like danger to others, and whether
 “ it has exercised this degree of diligence is, in general, a question
 “ of fact for the jury, under proper instructions, * * * *
 “ Whether the corporation had notice, or was negligently ignorant,
 “ is a question of fact for the jury. Notice will be inferred if the
 “ defect in the street or sidewalk has existed for a considerable
 “ length of time, or from the fact that the defect had existed so
 “ long as to render it notorious * * *.” Thompson on Neg-
 ligence, 761 and 763.

The question was fairly submitted by the Court to the jury.
 The judgment is,

AFFIRMED.

All the Justices concurring.

Russell v. Western Union Telegraph Company.

RUSSELL V. WESTERN UNION TELEGRAPH COMPANY.

1. DAMAGES: INJURY TO FEELINGS: MUST ACCOMPANY CORPORAL OR PERSONAL INJURY: NOT BREACH OF CONTRACT. No damages can be recovered for a shock and outrage to the feelings and sensibilities, or for mental distress and anguish, caused by a breach of a contract, (except a marriage contract.) Such damages can only enter into and become a part of the recovery in an action for a tort when the plaintiff has sustained some corporal or personal injury. No actual damages having been claimed in the complaint, it does not state a cause of action.

Appeal from the District Court of Grand Forks County.

Demurrer to complaint. The pleadings are set out on the opinion.

E. St. Julian Cox, for appellant.

Woodruff & Bangs, for respondent. No briefs on file.

HUDSON, J.—This action was brought against the defendant as a common carrier of messages to recover damages suffered by the plaintiff by the neglect of the defendant to transmit and deliver a certain message. That portion of the complaint which is material to be incorporated here, is as follows:

“III. That plaintiff heretofore had a sister living at Hunter, in Dakota, aforesaid, at which point, on the 14th day of June, 1882, the said defendant had and maintained an office for the reception and transmission of messages as aforesaid.

“IV. That on the day and year aforesaid, the defendant had and maintained an office for the reception and delivery of messages as aforesaid, at Grand Forks aforesaid.

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“ V. That on the day and year aforesaid, the said defendant
“ had and maintained a line of telegraph and telegraphic commu-
“ nications between the places, stations or points aforesaid.

“ VI. That on the said 14th day of June last aforesaid, at
“ Hunter aforesaid, for a valuable consideration, paid to said de-
“ fendant by one Alexander Russell, to-wit: the sum of ———
“ dollars, the defendant agreed to transmit and carry over its lines
“ of telegraph from Hunter aforesaid, to Grand Forks aforesaid,
“ forthwith, the following message sent by Alexander Russell,
“ directed to and entrusted to be sent, forwarded and delivered to
“ plaintiff at Grand Forks aforesaid, and defendant took and re-
“ ceived the said message and promised to transmit and send the
“ same and deliver the same forthwith to this plaintiff at Grand
“ Forks aforesaid, for the consideration paid as aforesaid.

“ VII. Said message was in the following words, to-wit:

“ HUNTER, June 14, 1882.

“ *To William D. Russell:*—Libby died last night; funeral to-
“ morrow; come; answer quick. A. RUSSELL.”

“ VIII. That the said company, defendant, did not fulfill said
“ agreement by them made and entered into as aforesaid, to trans-
“ mit and dispatch said message, or deliver it as agreed upon to
“ this plaintiff; but on the contrary, although the period between
“ the said day of delivering said message or dispatch to said de-
“ fendant at Hunter aforesaid, and the day on which it should
“ have been delivered to plaintiff, to-wit: the same day, to-wit:
“ June 14, 1882, was and would have been a reasonable time for
“ carrying, transmitting, sending and delivering said message afore-
“ said. Yet said telegraph company so negligently, willfully and
“ carelessly misbehaved and conducted said business, and in regard
“ to the same as a telegraph company, that they failed and will-
“ fully, carelessly and negligently withheld the transmission and

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“ dispatching said message to plaintiff, and carelessly, willfully
“ and negligently omitted to deliver said message so sent, or in-
“ tended so to be, to this plaintiff; that it was not delivered to or
“ received by this plaintiff until the 19th day of June, 1882.

“ IX. That by means thereof this plaintiff has been greatly
“ shocked, injured and outraged in his feelings and sensibilities, and
“ suffered great mental distress and anguish, to his damage in the
“ sum of fifty thousand dollars.

“ X. Wherefore and in consideration of the premises, plaintiff
“ demands judgment against said defendant in the sum of fifty
“ thousand dollars, with his costs in such behalf, laid, paid out,
“ and expended.”

To which the defendant demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and judgment was entered for the defendant, from which judgment plaintiff appeals to this court.

It is quite difficult to see from this complaint upon what principle the plaintiff can reasonably claim to have sustained damages of any kind. It is alleged that the plaintiff has been greatly shocked, injured and outraged in his feelings and sensibilities, and suffered great mental distress and anguish, to his damage in the sum of fifty thousand dollars, and this by means of the failure of the defendant to deliver the said message within a reasonable time. We cannot understand how the failure to deliver a message such as this, could cause the plaintiff such a shock to his feelings and sensibilities, when it does not appear who the person called Libby in the dispatch, and who had died, was—whether there was any family ties or near relationship between this person and the plaintiff that a delay in the receipt of such an announcement should cause him any greater shock, grief or anguish than it would or

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did other persons susceptible of the ordinary sympathies of the race. It may be presumed that she was the sister of the plaintiff mentioned in the complaint; but whether she was or not, is left entirely to conjecture.

There is nothing in this complaint that shows how any damages, even of the character claimed, could have been sustained by this plaintiff.

The counsel for the appellant contends that this neglect of the defendant to perform its duty was a tort, for which damages such as are claimed, could be recovered; but we think this position untenable. The complaint alleges a contract and a violation of said contract as the gist of the action, and it must be so regarded, and cannot be converted into a tort by any rule of law known to this court.

No case can be found where a person has been allowed to recover damages for a shock, injury or outrage to the feelings and sensibilities, arising and caused by the breach of a contract, (except it is a marriage contract.) Such damages can only enter into and become a part of the recovery when the plaintiff has sustained, by the negligence or wilful act of another, some corporal or personal injury; they never can be recovered independently and alone, and if recoverable at all, only in actions of tort: *Masters v. Warren*, 27 Conn., 293; *Stewart v. Ripon*, 38 Wis., 584. This would be the law without any statute on the subject, but the statute steps in and provides for a case of this kind, and says that "every person whose message is refused or postponed contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages and fifty dollars in addition thereto." Civil Code, Sec. 1287. It would seem that the intent of this statute was to fix the rights of parties in such cases, and it is doubtless exclusive of all other modes of procedure.

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In this case the complaint might be sustained if there was any claim for actual damages that the plaintiff is entitled to recover; and under this statute if he had made such claim he could recover nominal damages, although no actual damages were proved, and the fifty dollars additional—the latter being exclusive of all damages not actual; but as no damages are claimed, except something the plaintiff is not entitled to, the complaint does not state a cause of action.

There being no error in the judgment of the District Court, it is

AFFIRMED.

All the Judges concurring.

POWELL ET AL. V. McKECHNIE.

1. **STOPPAGE IN TRANSIT: RIGHT OF: MAY EXIST WHEN GOODS IN WAREHOUSE.** The delivery by the vendor of goods sold, to a carrier who is to carry on account of the vendee, is a constructive delivery to the vendee, but the vendor has a right, if unpaid, and the vendee be insolvent, to re-take the goods before they are actually delivered to the vendee. They are still in transit, though lying in a warehouse to which they have been sent by the vendor on the purchaser's order.
2. **LEVY OF ATTACHMENT: ACTUAL CONTROL OF GOODS: WHAT SUFFICIENT.** To constitute a valid levy of an attachment upon personal property, the officer must take actual possession and must have actual control of the property with power of removal. Such control must be exercised, as if done without the writ would amount to trespass.

Appeal from the District Court of Stutsman County.

The facts are fully stated in the opinion.

White & Hewit, for defendant and appellant. Points and authorities:

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To constitute an attachment there is no necessity of an actual manual custody of the property: Drake on Attach., 256-258. The property may be deposited with a custodian: Drake on Attach., 292, e.; *Hemmenway v. Wheeler*. 14 Pick., 408. The railroad company had become bailees, as warehousemen, of the property, for the consignee: Benj. on Sales, 845-853, and cases cited. To allow the right of stoppage in transit, there must be an intervening third party, the carrier. When the transit ends the right ends: Schouler's Pers. Prop., 590; Story on Sales, 336.

If the carrier becomes a warehouseman for the buyer by virtue of some contract or course of dealing with him, the transit is ended: Schouler's Per. Prop., 593-594; *Harris v. Pratt*, 17 N. Y., 249; *Sawyer v. Joslyn*, 20 Vt., 172; *Stubbs v. Lund*, 7 Mass., 457; *Hoover v. Tibbitts*, 13 Wis., 79; *Covell v. Hitchcock*, 23 Wend., 611.

When the goods come into the actual or constructive possession of the vendee the vendor's right of stoppage is gone: Benj. on Sales, 819, 882, n. b., 843-4, 851; *Cooper v. Bill*, 3 H. & C., 722, 727.

Allen & Dodge, for plaintiffs and respondents.

There being evidence to sustain the findings of the referee, they will not be disturbed: *Olson v. Tolford*, 37 Wis., 327. No one but the consignee or his agent as defined in section 1817, Civil Code, could terminate the transit by receiving the goods. The railroad company was not such agent: (Sec. 1817, *supra*.) The sheriff could not terminate the transit: *Naylor v. Dennis*, 19 Am. Dec., 319; *Seymour v. Newton*, 105 Mass., 272.

But if the transit was ended there was no valid levy of the attachment: *Huntington v. Blaisdell*, 2 N. H., 317; *Haverly v. Lowry*, 35 Ill., 450; *Hollister v. Goodale*, 21 Am. Dec., 687; Drake on Attach., 245; *Naylor v. Dennis*, 19 Am. Dec., 319.

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HUDSON, J.—This action was brought by the plaintiff under the statute of claim and delivery of personal property. From the evidence upon the trial it appears that the respondents, who were doing business at Waukeegan, Ill., were the owners of twenty-one "Star Wood Pumps" which were by them shipped on the 2d day of November, 1880, by rail consigned to one H. L. Inman, at Jamestown, Dakota, who had previously ordered the same and was to pay for them the sum of two hundred dollars in ninety days from that date; said pumps arrived in Jamestown via the N. P. R. R., about November 30, 1880, and were unloaded and placed in the freight depot at Jamestown. Immediately after said pumps were put in the depot, the appellant, as sheriff of said county, claimed to levy upon them, under a writ of attachment, in favor of John Deere & Co., against the goods of said H. L. Inman, the consignee. The writ was served by leaving a copy thereof with the defendant therein, H. L. Inman, and notifying said railroad company to hold said pumps subject to said writ. The sheriff did not remove them from the depot nor pay the freight to the railroad company for their transportation. During the transit of said pumps said H. L. Inman became insolvent, of which fact the respondents were notified, and they notified said railroad company of their claim as vendors, by a legal notice served on the station agent at Jamestown, and to hold said pumps subject to their order on account of said Inman's insolvency; said notice was served on the 3d day of December, 1880, three days subsequent to the service of said writ of attachment. When said notice of stoppage was served on the company, said pumps were in the depot at Jamestown with the freight unpaid. Said H. L. Inman never received said pumps nor took any action in regard to them. There afterwards the pumps were taken by the sheriff under the claim of said

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John Deere & Co., removed and sold by him. The freight on same was paid by the attorney of John Deere & Co., on the day of sale.

There are two questions presented in this case for consideration:

1st. Were these pumps in the actual possession of the consignee at the time of the levy, so that the right of stoppage *in transitu* was at an end?

2d. Did the appellant sheriff get possession and control of said property by a legal seizure under the writ of attachment?

The following general principles may be stated as applying to this case: The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication, named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee, but the vendor has a right, if unpaid, and the vendee be insolvent, to retake the goods before they are actually delivered to the vendee: *Keeler v. Goodwin*, 111 Mass., 490. Goods may be still in transit, though lying in a warehouse to which they have been sent by the vendor on the purchaser's order: *Benj. on Sales*, Sec. 846. And they are liable to stoppage as long as they remain in possession of the carrier: *Ib.* Sec. 841; *Clapp v. Peck*, 55 Iowa, 270; *White v. Mitchell*, 37 Mich., 390.

The essential feature of a stoppage *in transitu*, as has been remarked in many of the cases, is, that the goods should be at the time in the possession of a middle-man, or of some person intervening between the vendor who has parted with, and the purchaser who has not yet received them: *Benj. on Sales*, Sec. 842.

Counsel for the appellant contended strongly that the pumps were in the constructive possession of H. L. Inman, the consignee, as a fact decisive of the case; but if such constructive possession be conceded, still the vendor had his right of stoppage *in transitu*

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for the reason that the purchase price was unpaid and the vendee had not actually received them and was insolvent.

It was also insisted that the railroad company had changed their relation to the goods and became warehousemen, holding them for the consignee. There is no doubt but that the carrier may and often does become a warehouseman for the consignee, but that must be by virtue of some contract or course of dealing between them that when arrived at their destination the character of carrier shall cease and that of warehouseman supervene; but no contract of that kind, or course of dealing, appears anywhere in the evidence, and until something of that kind is shown, the *transitu* is not at an end. The carrier cannot change his character so as to become the buyer's agent to keep the goods for him without the latter's consent: Benj. on Sales, Sec. 851.

If this view is correct, then the sheriff could not legally take the property under a writ against the goods of the consignee, for the reason that he had never acquired title to them. We might drop the discussion at this point, but it has been so strongly insisted by counsel that the sheriff made a valid levy under the attachment that it seems proper that this question should receive some attention.

It appears from what was done by the sheriff, and which it is claimed was a levy, was by leaving a copy with the defendant, Inman, and notifying the railroad company to hold said pumps subject to said writ. This was not taking the property as required by law. At this time the pumps were in the freight depot, with the freight unpaid; but it appears that Mr. White, the attorney for the attaching creditors, was with the sheriff and told the agent, Mr. Harris, that he would guarantee the freights personally, and that Mr. Harris agreed so to hold them and accept Mr. White as guaranty for the freights, and he, and agents succeeding him, did

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-so hold them subject to Mr. White's order; but it also appears that the railroad company refused to accept this guaranty, it being without their knowledge and consent. The company might well refuse to accept such a guaranty, as it was a contract void by the Statute of Frauds and could not have been enforced. It was simply no contract at all. It was a guaranty or promise that Mr. White was at liberty to fulfill or not, at his option. If after it had been made the property had been destroyed by fire or any other circumstance had occurred to render it of no benefit to the guarantor, would he still have stood by it? Such a levy as this does not come up to the requirements of section 204, of the Code of Civil Procedure. A mere paper levy is void. The officer should take actual possession, but removal is not absolutely necessary, yet there must be actual control and view of the property with power of removal. The property may then be placed in the care of a third party but at the risk of the officer. Such control must be exercised, as if done without the writ would amount to trespass: Rorer on Judicial Sales, Sec. 1243-4; *Curey v. Bright*, 58 Penn. St., 70-84; 37 Penn. St., 500; *Very v. Watkins*, 20 How., 469.

It is assumed that the goods were the goods of the consignee, Inman, and it is claimed that Inman so testifies, but that is a question of law. The facts show that they were not his and that he had no right of possession. If Mr. White had been acting for Inman, his action would have placed the goods in the possession of the railroad officials as bailees of the property for Inman, and the transit would have been at an end. Even in that event this levy could not be maintained. The judgment of the District Court is

AFFIRMED.

All the Judges concurring.

Territory ex rel. County Commissioners v. Cavanaugh.

TERRITORY EX REL. COUNTY COMMISSIONERS V. CAVANAUGH.

1. **MANDAMUS: WILL NOT LIE, BRING REMEDY AT LAW: COUNTY TREASURER.** Section 95, of chapter 28, of the Political Code, having provided for an action to recover all money in the hands of a county treasurer which he shall fail to pay over, the writ of mandamus cannot be invoked to compel such payment.
2. **COUNTY TREASURER: NOT ENTITLED TO COMMISSION ON BONDS.** A county treasurer is not entitled to commissions upon the proceeds of county bonds brought into the treasury without his instrumentality.

Appeal from the District Court of Grand Forks County.

The facts appear in the opinion.

Bosard & Clifford, for defendant and appellant. Points and authorities cited:

Mandamus lies where there is not a plain, speedy and adequate remedy in the ordinary course of law: Code of Civil Proc., Sec. 696. The converse is equally true: 4 Wait, 357. The test is, whether the remedy at law will furnish the specific relief sought by the writ: *People v. Loucks*, 28 Cal., 68; id. 365-371; *Kimball v. Union Water Co.*, 44 Cal., 173; S.C. 13 Am. Rep., 157; 10 Am. Dec., 115; *American Asylum v. Phoenix Bank*, 4 Conn., 17; 19 Am. Dec., 508 n.; *Michigan Paving Co. v. Detroit*, 34 Mich., 201. As to treasurer's compensation, Chap. 39, Sec. 15, Political Code.

E. St. Julian Cox, for plaintiff and respondent.

An action on an officer's bond is not a plain, speedy and adequate remedy: 47 Cal., 488; 2 Dillon Mun. Corp., 840 n., Sec. 910 n., p. 821 n. 2, 855, n. 829; *Moses on Mandamus*, 108 to 110, 242; 4 Wait's Ac. and Def., 368-9-70 and 375.

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HUDSON, J.—During the years 1879–80, the appellant was treasurer of the county of Grand Forks. In the year 1879 the respondents issued the bonds of said county to build a court house, to the amount of \$10,000, and by said respondents sold without the intervention of the appellant, except that he received the money as treasurer. In 1881 said treasurer settled with the county commissioners, retaining out of the county funds in his hands the sum of \$400, claimed as commissions on the proceeds of the bonds—\$10,000—at four per cent. The respondents rejected such settlement and demanded the full sum in his hands, which demand was refused. Whereupon at the April term of said District Court, the respondents filed a petition for a writ of mandamus to compel said treasurer to pay over said \$400, and thereupon the court ordered an alternative writ to issue, returnable at the same term. Upon the return of said writ the appellant appeared by counsel and moved to quash the writ, which motion was overruled by the court. Thereupon the appellant filed his answer. The court, after hearing the proofs, ordered a peremptory writ of mandamus to issue, from which order this appeal is taken.

The writ of mandamus can issue in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. If there is such remedy in the ordinary course of law, it is very clear this writ cannot be invoked. We think the Political Code, section 95, of chapter 28, has provided such remedy by making it the duty of the county clerk, on receiving instructions for that purpose from the Territorial Auditor, or from the county commissioners of his county, to cause suit to be instituted against such treasurer and his sureties, or any of them, in the District Court of his county, to recover all money in the hands of the county treasurer which he shall fail to pay over. Under this provision it is

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clear that a plain, speedy and adequate remedy in the ordinary course of law may be had; hence mandamus cannot be maintained.

This is decisive of the case, but the question of the right of the county treasurer to commissions upon this fund was much discussed, and as the question is of some importance, it seems proper that this question should receive a little attention.

The compensation of the county treasurer, provided by law for all money collected by him for each fiscal year, is four per cent. The section of the statute providing for advertising and selling lands for delinquent tax, gives an additional fee of four per cent, to be paid only so far as the lands are actually sold and out of the fund received therefor, and to be collected in each case where the lands are sold and from the purchaser; but for all other cases and services the treasurer shall be paid in the same *pro rata* from the respective funds collected by him, whether the same be in money, territorial or county warrants. These provisions for the compensation of the county treasurer are intended to fix the commissions of that officer for collecting the ordinary revenue of the county, and have no application to a fund brought into the county treasury without his instrumentality. It cannot apply to the proceeds of bonds issued and negotiated by the county commissioners. His commissions are upon money *collected* by him. He did not *collect* the proceeds of the bonds.

Counsel contend that the words, "for all other services," etc., in the last clause above quoted, give him commissions on the fund created by the sale of bonds; but these words have reference only to the cases and services in the selling of lands for delinquent taxes, to be paid out of the respective funds. If the construction contended for should prevail, double commissions would be paid upon this fund, as the treasurer would clearly be entitled to such on the taxes collected by him to pay the bonds. The order of the District Court is

REVERSED.

Justices all concurring.

Wood v. Cuthbertson et al.

OCTOBER TERM, 1884.

PRESENT:

HON. ALONZO J. EDGERTON, CHIEF JUSTICE.

HON. SANFORD A. HUDSON,

HON. WILLIAM E. CHURCH,

HON. CORNELIUS S. PALMER.

} ASSOCIATE JUSTICES.

WOOD V. CUTHBERTSON ET AL.

1. **USURIOUS CONTRACT: INTEREST CANNOT BE RECOVERED.** Two promissory notes were executed upon a loan of \$3,000, of \$1500 each, payable in six and twelve months, with interest at 12 per cent. after due, and four other notes were given for the interest to accrue upon the first two notes before due at the rate of two per cent. per month, payable at the end of each three months, respectively, with exchange: Held, that this being one entire transaction, all the notes were usurious, and the fact that the contract was separated into these parts did not relieve it of its usurious character: Held, further, that the taint of usury affected the whole and every part of it, the interest accruing upon the two notes given for principal, after maturity, as well as that accruing before, and that allowing the plaintiff to recover such interest was error.
2. **ILLEGAL INTEREST PAID: WHEN A COUNTER CLAIM.** Section 1100, of the Civil Code of Dakota, declaring all interest upon a usurious contract forfeited, and providing that the excess paid over 12 per cent. may be recovered from the person taking it, does not give the right to maintain a counter claim by reason of such forfeiture, for the whole interest in an action to collect the principal. Only the excess over 12 per cent., and when illegal interest has been stipulated for and not paid, then only the principal without interest, can be recovered.

Appeal from the District Court of Lawrence County.

The facts are stated in the opinion.

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J. M. Young & Granville G. Bennett, for appellant.

A contract to do an act forbidden by law is void, and cannot be enforced in a court of justice: *Bank of U. S. v. Owens*, 2 Peters, 527; Tyler on Usury, 377.

Separate notes given for usurious interest will not relieve the contract of its usurious character: *Cooper v. Tappan*, 4 Wis., 362; *Delano v. Rood*, 1 Gillman, 690; Tyler on Usury, 355-7. Courts will not permit the law to be evaded: *Lee et al. v. Peckham*, 17 Wis., 383; *Macumber v. Dunham*, 8 Wend., 554; *Merrills v. Law*, 9 Cow., 65. The court will not break the contract into pieces and hold part good and part illegal: *Gillman v. Woolcock*, 13 Wis., 589; *Lee v. Peckham*, *supra*.

That portion of the usury statute relating to the recovery of the excess of interest over that allowed by law, applies to cases only where action is brought separately for that purpose: 7 Wait's Ac. & Def., 634.

Under the usury statute of Illinois usurious interest paid cannot be recovered back, but may be deducted from the unpaid residue of the debt: *Murry v. Stockton*, 34 Ill., 306; *Canter v. Moses*, 39 id., 359; *Farwell v. Meyer*, 35 id., 40; *Booker v. Anderson*, id., 63; *Saylor v. Daniels*, 37 Ill., 331; *Rainback v. Crabtree*, 77 id., 182.

When a party seeks to enforce a usurious contract the forfeiture of interest is enforced. But if seeking relief in equity against a usurious contract, the court could require him to pay legal interest: 37 Ill., 216; 42 id., 256; 86 id., 197; 44 id., 405.

The same doctrine is held in Pennsylvania: "All the interest paid must be credited, and not merely the excess:" *Overholt v. Nat. Bank*, 8 Pa. St., 490; 7 Wait's Ac. & Def., 631.

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It is certainly a new doctrine that a party may enter into a usurious contract, and then if usury is pleaded, lose nothing that the strictest legal contract would give him, and recover his principal and the highest rate of interest allowed by law. Usurious interest paid may be pleaded as a counter claim: *Wood v. Lake*, 13 Wis., 84; *Eastman v. Porter*, 14 id., 39; *Fay v. Lovejoy et al.*, 20 id., 428; *Doyle v. Northrup*, 19 id., 249; *Overholt v. Nat. Bank*, 82 Pa. St., 490; Code of Civil Proc., Sec. 119.

W. C. Kingsley, for respondent.

This is a suit in equity, and before defendant can ask relief affirmatively, he must tender back the amount of principal unpaid, with legal interest. This is fundamental: *Livingstone v. Harris*, 3 Paige, 528; same case, 11 Wend., 329.

The counter claims are purely statutory, and can only be enforced in an independent action "in the proper court:" Civil Code, Sec. 1100; *Barnet v. Nat. Bank*, 98 U. S., 555.

The correctness of this decree, so far as appellants are concerned, seems so clear we forego further comment.

HUDSON, J.—This action was brought to foreclose a mortgage upon real estate, given by defendant, Cuthbertson, to secure the sum of thirty-five hundred dollars, represented by six promissory notes, as follows: \$1500, due six months after date; \$1500, due twelve months after date, with interest after due at one per cent. per month; \$180, due three months after date; \$180, due six months after date; \$90, due nine months after date; \$90, due twelve months after date. All of said notes were made payable with exchange, and attorney's fees, in case collection should be enforced by law.

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This mortgage and these notes were executed to the plaintiff by the defendant, Cuthbertson, upon a loan to the latter of the sum of \$3,000, for which the first two notes of \$1500 were given. The other four notes were given for interest to accrue on said loan at two per cent. per month, payable at the end of every three months; the notes corresponding in amount and time of payment, respectively. These interest notes were paid, and the sum claimed to be due at the commencement of this action, was the principal represented by the two notes of \$1500 each, and interest on the same after due.

The defendant, Cuthbertson, answering for himself, admits that the two notes of \$1500 have not been paid, but alleges that all of said notes were usurious, and demands that the whole sum already paid on the said interest notes be allowed him as a counter claim against the plaintiff's claim in this action.

The defendant, Nathan E. Davis, denies the material allegations of the complaint. A demurrer to the answer being overruled, an order for judgment was entered that plaintiff recover upon the two \$1500 notes the sum of \$3,000, with interest thereon amounting to the sum of \$717, subject to a deduction of \$270 for excess of interest over twelve per cent. per annum, paid by said defendant to plaintiff on the sum of \$3,000.

The foregoing statement of the issues in the case is deemed sufficient to disclose the real contention between the parties. The questions for determination arise mainly upon a construction of the Code relating to interest and usury.

By section 1097, Civil Code of Dakota, the legal rate of interest upon money is declared to be 7 per cent., and by section 1098 it is made unlawful to contract for a higher rate than 12 per cent. per annum, and section 427, of the Penal Code, makes the taking of a higher rate a misdemeanor.

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There can be no doubt that the notes were executed in a clear violation of these provisions. The agreement was to pay interest upon this loan at the rate of two per cent. a month, and the notes were given for the same. It was one entire transaction, and the fact that the interest so stipulated to be paid was evidenced by separate notes, which were paid as they fell due, will not relieve the contract of its usurious character: *Lee v. Peckham*, 17 Wis., 383.

“If the design of the whole transaction, and the inducement to it, was to lend money on usurious interest, the taint of usury affects the whole and every part of the contract, and no one portion thereof, although in form an independent contract, is made valid by the fact that taken by itself it is free from objection. The very fraud consists in disguising usury by separating the contract into these parts:” *Gillmore v. Woolcock*, 13 Wis., 589; *Merrills v. Law*, 9 Cow., 65; *id.*, *Reed v. Smith*, 647; *Rock County Bank v. Wooliscroft*, 16 Wis., 22; *Steele v. Whipple*, 21 Wend., 103; *Maniteau Nat. Bank v. Miller*, 11 Rep., 847; *Bank v. Stauffer*, 10 Rep., 70.

The two notes given for principal provide for payment of exchange in addition to interest after due at the highest legal rate. In view of the fact that nothing appears to show any necessity for transmission of the funds to a distant point, it may fairly be assumed as a matter of fact that the payment of exchange was a mere cover for usury: *Stevens v. Lincoln*, 7 Met., 525; *Townsend v. Durkee*, 12 Wis., 480.

The appellant, the defendant below, having paid this usurious interest, seeks to recover it back from the plaintiff (or which is the same thing) to have it allowed to him as a counter claim in this action.

It is claimed that section 1100, of the Civil Code, justifies a

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recovery. It is as follows: "Section 1100. A person taking, " receiving, retaining or contracting for a higher rate of interest " than at the rate of 12 per cent. per annum shall forfeit all the " interest so taken, received, retained, or contracted for. It be- " ing the intent and meaning of this section not to provide a for- " feiture of any portion of the principal."

" When a greater rate of interest has been paid than 12 per " cent. per annum, the party paying it, or his personal represen- " tative, may recover the excess from the person taking it, or his " personal representative in an action in the proper court."

While this section of the Code declares all interest upon a usu- rious contract forfeited, it does not provide that *all* the interest may be recovered from the person receiving it, only the excess, and no right of recovery is given because of such forfeiture, ex- cept of the excess; it will, however, avail as to the interest not already paid.

This defendant, Cuthbertson, made this agreement with the plaintiff presumably knowing the law. These interest notes were void the moment of their inception, and the defendant could have successfully resisted their payment, but he freely and voluntarily, for aught that appears, paid them; whether from ignorance of the law and their true character, or knowing the law he was willing to carry out and fulfill a void contract, does not appear, but in either case his mouth is now closed. The time was when he might have spoken and refused to pay any interest. He might have declared all the interest upon these notes forfeited, but that time has passed. It is now too late, except such as accrued upon the notes given for principal after due, and not paid. As to that he may declare the forfeiture and refuse to pay.

Counsel on the argument direct our attention to a statute of Illinois providing that upon a usurious contract the whole interest

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shall be forfeited, and in an action to enforce the contract, only the principal sum due shall be recovered; and to decisions of the courts of that State, under this statute, holding that the usurious interest paid cannot be recovered back, but may be deducted from the residue of the debt unpaid. It is difficult to see how these decisions can be authority in this case.

Section 1100, of our Civil Code, is the same as to the forfeiture; then adds the provision for the recovery of the excess of the usurious interest paid over 12 per cent. per annum, differing from the Illinois statute. This, we think, is exclusive of all other remedies. The Code having declared the law as to the recovery of usurious interest there is no common law right: See Sec. 6, Civil Code.

The interest allowed to the plaintiff by the court below, amounting to \$717 appears to be that which accrued upon \$3,000, the principal sum after due to date of judgment, with a reduction of \$270 excess already paid over 12 per cent. per annum, possibly upon the theory that interest after due was not affected by the usurious contract. Can this view be sustained by authority?

By section 5198, of the U. S. Revised Statutes, "the taking, "receiving, reserving, or charging a rate of interest greater than "is allowed by the preceding section (that allowed by the local "law) when knowingly done, shall be deemed a forfeiture of the "entire interest which the note, bill, or other evidence of debt "carried with it, or which has been agreed to be paid thereon."

In *Bank v. Stauffer*, decided by the U. S. Court, Western District of Pennsylvania, 10 Reporter, 70, the plaintiff had charged and received more than the legal rate of interest for the period between date and maturity of the note, and the question was whether the fact subjected the bank to a forfeiture of the interest which accrued afterwards, and it was held that it did. The court ob-

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served that "the entire interest which the note carries with it is forfeited, and if this means all the interest which accrues upon it, which I think it clearly does, it is difficult to understand how any part of it is recoverable. When illegal interest has been stipulated for and not paid, then only the sum lent, without interest, can be recovered. By the operation of the act a usurious contract is inherently vicious, so that it cannot carry any interest with it; hence it would inadequately effectuate the intent of the act to hold that such a contract is purged of its taint and is invested with a capacity denied it before by the failure of the debtor to pay the debt evidenced by it at maturity." This case is considered and approved in *Maniteau National Bank v. Miller*, 11 Reporter, 847.

There are cases holding that when no usurious interest has been contracted for in the preceding agreement to accrue before maturity, the payment, or agreement for payment of more than legal interest accruing after maturity, is regarded as a penalty for non-payment, and is not usurious: *Lloyd v. Scott*, 4 Peters, 225; *Fisher v. Otis*, 3 Pinney, Wis. Rep., 78; 3 Chandler, 83.

We think there was error in permitting the plaintiff to recover interest upon the notes after maturity. Therefore let the judgment be modified by allowing to the plaintiff the sum of \$3,000, being the principal amount of the two notes sued upon without interest, and deducting therefrom the amount of interest already paid by defendant, Cuthbertson, in excess of the rate of 12 per cent. per annum upon said principal amount, to be computed to the time such payments were made.

In so far as it is not in accordance herewith the said judgment is hereby reversed. In all other respects it is,

AFFIRMED.

EDGEINGTON, C. J., dissenting.

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MARES v. NORTHERN PACIFIC R. R. COMPANY.

1. **NEGLIGENCE: WHEN MATTER OF DEFENSE: BURDEN OF PROOF.** In an action based upon the negligence of the defendant, if the plaintiff can prove his own case without disclosing his own contributory negligence, then such contributory negligence is purely a matter of defense, to be proved by the defendant. And, although the plaintiff's evidence tends to prove his own negligence, the affirmative of that issue is still with the defendant, and because he may use the evidence of the plaintiff to support his side of the case, that fact does not shift the burden of proof from the defendant to the plaintiff.
2. **CONTRIBUTORY NEGLIGENCE; FOR THE JURY, WHEN.** The question of contributory negligence is for the jury when the evidence is conflicting; or when the facts are undisputed, if different minds might draw different conclusions from them.
3. **SAME: WHEN IT MAY BECOME A QUESTION FOR THE COURT.** But when the facts are undisputed, or conclusively proved, and there is no reasonable chance for fair minded men to draw different conclusions from them, and there can be but one conclusion, the question of negligence becomes one for the court.

Appeal from the District Court of Cass County.

Verdict for plaintiff for \$20,000 damages. The facts necessary to an understanding of the points decided are stated in the opinion.

W. P. Clough, for appellant and defendant.

Mares, when he mounted the car, was perfectly aware of the reckless and dangerous frame of mind in which Bassett was at the time, and also of the fact that the cars were then being handled in a way full of peril to every one working about them. He had the power, had he seen fit to exercise it, to call Bassett to a halt—to stop him entirely before mounting the car. It will not do to say that Mares may not have anticipated that Bassett would so sud-

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denly reverse his engine. He had every reason to momentarily expect the happening of an accident of some kind, that could not help but result seriously to those at work about the engine and cars. Of course the law will not permit an employer to be saddled with the consequence of such gross negligence on the part of its servant: *C. C. & I. C. Ry. Co. v. Troesch*, 57 Ill., 155.

The act of Bassett in reversing his engine was a positive act of pure malice and wantonness. It belonged to the same category as a blow struck in anger; hence the employer was not liable for the consequences. It is believed no case can be found where an employer has been held responsible for a positive act of malice or wantonness resulting in an injury to a fellow employe.

The correct rules upon the subject of burden of proof in such cases are undoubtedly laid down by Mr. Wharton in his work on Negligence, Secs. 423-430.

Wilson & Ball and *Thomas Wilson*, for respondent.

Whether or not plaintiff pursued the course of a prudent and reasonable man under the circumstances, was a question for the jury and not for the court: *Snow v. Hous. R. Co.*, 8 Allen, 441, 448, *et seq.*; *Patterson v. R. Co.*, 76 Pa. St. Rep., 389; *Herbert's Case*, 13 N. W. Rep., 349; *Clark v. Holmes*, 7 Hurl. and Nor., 937, 944, 945, 949; *Conroy v. Vulcan Works*, 62 Mo., 35, 39; *Stoddard v. St. L. R. Co.*, 65 Mo., 514; *Keegan v. Kavanaugh*, 62 Mo., 230; *Porter v. R. Co.*, 60 Mo., 160; *Coombs v. New Bedf. Co.*, 102 Mass., 572, 585, 587, 588; *Smith v. Lowell*, 6 Allen, 40; *Reed v. Northfield*, 13 Pick., 95, 98; *Fox v. Sackett*, 10 Allen, 536; *Wood's Mas. and Servt.*, Secs. 357, 359, 360, 376, 385, 400; *Pierce on Railway*, 314, 317, 318, 319; *Farmandes v. Sac. R. Co.*, 52 Cal., 45; *Thompson v. E. R. Co.*, 110 E. C. Law (2 Best and Smith,) 106; *Bernhardt v. Reiss*, 1 Abb. Ct. of Ap-

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peals, 131; *Hawley v. N. Y. Cent. R. Co.*, 17 Hun, 115; *id.*, 82 N. Y., 370; *Weber v. N. Y. Cent. R. Co.*, 58 N. Y., 455; *Thurber v. R. Co.*, 60 N. Y., 331; *Muldooney v. R. Co.*, 36 Iowa, 462, 470-1; *Mayo v. Bos. & M. R. Co.*, 104 Mass., 137, 141-2; Shear. & Redf. on Neg., Sec. 95; *McCurley v. Clark*, 40 Pa. St. Rep., 399, 406-7; *Whitaker v. West Boylston*, 97 Mass., 273; *Looney v. McLean*, 129 Mass., 33, 36; *Briam v. French*, 29 A. L. Journal, 372; *Nave v. Flack*, 29 A. L. Journal, 366, 368; *C. & N. W. R. Co. v. Bayfield*, 37 Mich., 42.

Whether the plaintiff *had the opportunity* of knowing that Bassett was reckless or incompetent, is not the question to be considered. Plaintiff had a right to assume that in the employment and retention of his fellow servants, the defendant had done its duty, and he was not bound to inquire whether that duty had been neglected: *Porter v. R. Co.*, 60 Mo., 160; *Cummings v. Vulcan*, 62 Mo., 35; *Dale v. R. Co.*, 63 Mo., 455; Wood's Master and Servant, Secs. 376, 385, 400; Herbert's Case, 13 N. W. Rep., 353; *Muldooney v. R. Co.*, 36 Iowa, 462, 470, 471; and cases cited.

In the Federal Courts, as in the courts of many of the States, and on principle, on the question of contributory negligence the burden is on the defendant, and, of course, such a defense can only be established by a preponderance of evidence. I do not claim, nor did the Court charge that such evidence must be offered by the defendant.

To say, as the Court charged, that there must be such a preponderance of evidence to justify the jury in finding that the defense is established, is merely equivalent to saying that the jury should decide on the weight of evidence: See *Indianapolis R. Co. v. Hurst*, 93 U. S., 298-9; *R. Co. v. Gladstone*, 15 Wal., 401; *Hough v. R. Co.*, 100 U. S., 225-6; *Hocum v. Wathrick*, 22 Minn., 152; Herbert's Case, 13 N. W. Rep., 354; Wharton on

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Negligence, Sec. 423; *Pa. R. Co. v. Weber*, 76 Pa. St. R., 157, 168; *Weiss v. Pa. R. Co.*, 79 Pa. St. Rep., 387, 390; *Pa. R. Co. v. Warner*, 89 Pa. St. Rep., 59; *Robins v. U. Pac. R. Co.*, 48 Cal., 409, 426; *Paducah & M. R. v. Hoehe*, 12 Bush., (Ky.) 46, 47; *Mayes v. C. R. & P. R. Co.*, 14 N. W. Rep., 342; *Hayes v. Gallagher*, 72 Pa. St. Rep., 136.

For the purpose of proving notice to the defendant of the carelessness and recklessness of Bassett, it was competent to show his general reputation for carelessness, etc.: *Pierce on Railways*, 383; *Gilman v. Eastern R. Co.*, 13 Allen, 433, 444; 10 Allen, 232; *Davis v. Detroit R. Co.*, 20 Mich., 105; *Fruzier v. Pa. R. Co.*, 38 Pa. St., 104.

HUDSON, J.—The plaintiff in this case was employed by the defendant as a brakeman in its yard at Fargo. While so employed it was his duty to switch and distribute cars and make up trains each day and night. To do such work a switch engine was employed, propelled by steam; and to run and operate this engine, one Bassett was employed by the defendant, and did serve on said engine.

It is alleged in the complaint of the plaintiff, in substance, (and seems to have been maintained by proof) that said engineer was a man of hasty and excitable disposition and ungovernable temper, and had been, while in the employ of the defendant as engineer, accustomed to become unduly and dangerously excited and angry, and while in the performance of his duty was accustomed to act in a most reckless manner, causing great danger and peril to his fellow servants, especially to the brakemen on the train attached to, or moved by the switch engine, all which the defendant had long known.

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That in the month of October, 1881, while the plaintiff was in the discharge of his duty as brakeman in the night time, and while upon the top of a freight car, part of a train being moved in the yard by the switch engine on which Bassett was engineer, the plaintiff from his position on the rear car, gave the engineer a signal to move back the cars so attached to the engine, the length of a certain number of cars indicated by the signal; that while the cars were moving backwards, and before they had been moved backwards the distance they were intended to be moved, and as indicated by the signal given by the plaintiff, the said engineer suddenly and without warning, stopped and reversed his said switch engine and the cars attached thereto, and thereby threw the plaintiff off the rear car where he was standing, onto the ground; thereupon the said engine suddenly, before the plaintiff had time to move out of the reach of the cars, or off the track, pushed the said cars backwards upon said track, and over the plaintiff, and thereby injured the plaintiff—crushed and broke both of his legs so that it became necessary to amputate them.

The defendant in its answer, among other things, avers: “That the said fall of the plaintiff, and his said injuries resulting therefrom, were solely caused either by the negligence of the plaintiff himself, or by that of some one or more of the other employes of the defendant engaged at work, together with the plaintiff in the defendant’s said yard at the time of the happening of the said injuries, and not by any negligence or fault on the part of this defendant.”

It appears by the evidence that the plaintiff had previously had experience as a brakeman at other places, but had worked in this yard with this engineer but about a week, and his acquaintance with him had been formed in that time; that on the same night of the accident, before it occurred, the plaintiff and the said engi-

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neer had an altercation or dispute in relation to the work of the yard. It appears also in the evidence that the defendant had discharged the said engineer at some time prior to this, on account of some misconduct on his part, and had employed him again; that the superintendent of the company had full knowledge of the character and habits of the engineer. There was considerable proof on both sides relating to the circumstances of the accident, and the conduct of both the engineer and this plaintiff, which was somewhat conflicting.

The negligence of the defendant, company, complained of by the plaintiff, is in neglecting to use ordinary care in the selection of the engineer. The record in the case specifies many alleged errors as occurring at the trial in the court below, but the counsel in his argument before this court did not press upon our attention any except those relating to the contributory negligence upon the part of the plaintiff; therefore, only those will now be considered.

The alleged errors arise upon the charge of the Court given to the jury, and refusal to charge as requested by defendant. The first is as follows:

“It is also true that if the plaintiff had full knowledge of
“the reckless and careless habits of the engineer, Bassett, as com-
“plained of by him, or had reason to know of such recklessness
“and carelessness, he should either have quit the service, or re-
“ported the facts to the officers of the company having the power
“to discharge him, and a failure to do so might be negligence on
“his part. But, gentlemen, it is for you to say, from all the at-
“tending circumstances whether he was negligent in that regard.
“While this rule of law above stated is generally true, a reasonable
“view must be taken in its application here. The evidence tends
“to show that the plaintiff had been at work in this yard but a
“short time, and only a part of that time with, or under, this en-

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“gineer, Bassett. Now, had he such knowledge, or had he such an opportunity to know, of the careless and reckless habits of Bassett, rendering it dangerous for him to work with him, that made it his duty to have refused to continue in such service, or to have reported him to the officers of the company? The defendant having alleged negligence on the part of the plaintiff, denominated contributory negligence, it must be established by a preponderance of evidence to warrant you in finding it.”

The defendant's counsel requested the Court to charge as follows, which was refused:

1. “The jury are hereby instructed to find for the defendant.”
2. “If the plaintiff knew, or had an opportunity of knowing, before his fall from the car in question, that Bassett was an unfit or unsafe man to run the engine in question, in that case it was the plaintiff's duty to refuse to work with him any longer, and his failure to do so would prevent him recovering in this suit.”
3. “The evidence adduced on behalf of the plaintiff tended to show that Bassett was guilty of negligence in running his engine during the same night on which the plaintiff was hurt, previous to the accident, and while the plaintiff was working with him. If the jury believe such to have been the facts it must find for the defendant.”

The defendant objects particularly to that portion of the charge of the Court in these words: “The defendant having alleged negligence on the part of the plaintiff, denominated contributory negligence, it must be established by a preponderance of evidence to warrant you in finding it,” and contends that it was for the plaintiff to show that he was free from fault, and insists that it was error to refuse to charge as requested, and to submit the question of contributory negligence of the plaintiff to the jury upon the facts proven. While it is true that the absence of rea-

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sonable care or caution on the part of one seeking to recover for an injury received, will prevent a recovery, it is not correct to say it is incumbent upon him to prove such care and caution. The want of such care and caution, or contributory negligence, is a defense to be proved by the other side.

The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the plaintiff.

In an action based upon the negligence of the defendant, if the plaintiff can prove his case without disclosing his own contributory negligence, then such contributory negligence is purely a matter of defense to be proved by the defendant. The fact that the plaintiff in making his proofs on his part, introduces evidence tending to prove his own contributory negligence, does not change the nature of the issue. The affirmative of the issue on the question of the plaintiff's negligence is still with the defendant, and because he may use the evidence introduced by the plaintiff to support that side of that issue, that fact does not shift the burden of proof from the defendant to the plaintiff: *Kelly et al. v. Chicago & N. W. Ry. Co.*, 19 N. W. Rep., 521; *Randall v. N. W. R. Co.*, 11 N. W. Rep., 419; *Hoth v. Peters*, 55 Wis., 405; *Abb. Tr. Ev.*, 595; *Abbott v. Chicago, Milwaukee & St. Paul Ry. Co.*, 30 Minn., 482.

The question of contributory negligence may, in some cases, upon a certain state of facts, become a question of law for the court. "It is so when the facts are undisputed or conclusively proved, and there is no reasonable chance for drawing different conclusions from them; and even if there be a controversy in the evidence as to some facts, yet if those that are uncontroverted

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“ clearly and indisputably establish negligence, it is still a question of law for the court. But where the evidence on material points is conflicting, or where the facts being undisputed, different minds might reasonably draw different conclusions from them, and on which fair minded men of ordinary intelligence might differ as to the inferences to be drawn therefrom, the question of negligence cannot be passed upon by the court.” *Abbott v. Chicago, Milwaukee & St. Paul Ry. Co.*, 30 Minn., 482.

Nothing appears in the evidence on the part of the plaintiff tending to show negligence or want of proper care and caution on his part that would justify the Court in taking the question from the jury. The *onus* was, then, upon the defendant, if he alleges contributory negligence, to sustain his allegation by a preponderance of the evidence. All the evidence adduced by the defendant, as well as all evidence given on the part of the plaintiff, is proper to be considered and weighed by the jury in determining whether there was any fault on the part of the plaintiff. It is not enough that the jury find the plaintiff guilty of a want of care and caution, but they must also find, to defeat a recovery, that such want of care and caution contributed proximately to the injury complained of. These facts must be determined from all the evidence and all the circumstances of the case: *Hough v. R. Co.*, 100 U. S., 225; *R. Co. v. Gladmon*, 15 Wal., 401; *Mayers v. C. R. I. & P. R. Co.*, 14 N. W. Rep., 342; *Herbert v. N. P. R. Co.*, 13 N. W. Rep., 354; *Hatfield v. Chicago, R. I. & P. R. Co.*, 16 N. W. Rep., 336.

“ The question of negligence or want of ordinary care, is one of a complex character. The inquiry, not only as to its existence, but whether it contributed, with negligence on the part of another, to produce the particular effect, is much more complicated. As to both, they present, from their very nature, a question, not

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“ of law, but of fact, depending on the peculiar circumstances of
“ each case, which circumstances are only evidential of the prin-
“ cipal fact, that of negligence, or its effects, and are to be com-
“ pared and weighed by the jury, the tribunal whose province it
“ is to find facts; not by any artificial rules, but by the ordinary
“ principles of reasoning; and such principal fact must be found
“ by them before the Court can take cognizance of it and pronounce
“ its legal effect.” *Beers v. The Hoosatic R. Co.*, 19 Conn.,
566; *Park v. O'Brien*, 23 Conn., 339; *Herbert v. N. P. R. Co.*,
13 N. W. Rep., 349.

We are of the opinion that both the question of the defendant's
negligence, and the contributory negligence of the plaintiff were
questions for the jury, and not for the Court, upon the evidence.
The judgment of the court below is,

AFFIRMED.

All the Justices concurring.

HICKEY v. RICHARDS.

1. FORECLOSURE BY ADVERTISEMENT: ASSIGNEE MUST FIRST RECORD ASSIGNMENT.
The purchaser of a mortgage containing a power of sale cannot foreclose
the same by advertisement under the statutes of this Territory, without a
written assignment of such mortgage has been first duly executed, acknowl-
edged and recorded as provided by law.

Appeal from the District Court of Minnehaha County.

All the material facts are stated in the opinion.

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C. H. Wynn, for defendant and appellant.

The assignment of a debt carries with it the security: Civil Code, Sec. 1727; 1 Jones on Mort., 812, 813, 817, 818, 787.

Winsor & Swezey, for plaintiff and respondent.

There being no written assignment the defendant had no authority to sell the premises, and his attempted foreclosure was utterly illegal: Civil Code, Sec. 313; Code of Civil Proc., Sec. 589; *Morrison v. Mendenhall*, 18 Minn., 232.

PALMER, J.—This action was brought in the District Court for Minnehaha county by the respondent, Hickey, against the appellant, Richards, to restrain the sale of a tract of land situate in Minnehaha county, and to obtain the release of a mortgage on the same land.

The case below was tried by the Court; judgment was rendered for the plaintiff, and the cause comes to this court by appeal.

It appears from the record that on or about the 29th day of March, 1879, one Fred. A. Taylor executed to H. L. Hollister, (one of the firm of J. B. Young & Co.) a note, securing the same by mortgage upon the N. W. $\frac{1}{4}$ of Sec. 27, in township 101, of range 47, in Minnehaha county, Dakota; Taylor being then the owner of said land. Said note became due and payable the 15th day of November, 1879. This is the mortgage in controversy here.

It also appears that on or about the 8th day of April, 1882, and while the note and mortgage in question were still in the posses-

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sion of said Hollister, the respondent, Hickey, acquired title to and became the owner of the land in question.

It further appears that on or about the 28th day of April, 1882, and after said Hickey had purchased the land, the appellant, Richards, by his attorney, C. H. Wynn, represented to said Hollister that Richards had become the owner of, or interested in said land upon which the mortgage in question had been given, and requested him (Hollister) to deliver up or assign to him said mortgage and note; and thereupon said Hollister endorsed said note without recourse, and delivered it, as well as the mortgage, to said Wynn as attorney for Richards, Wynn paying Hollister the amount of the note with the interest.

No written assignment of said mortgage was ever executed by the mortgagee, Hollister, to Richards. The note was past due when it was received by Richards.

The record in this case does not furnish us a copy of the mortgage, but it is treated by counsel upon both sides as being an ordinary mortgage of real estate with the usual powers of sale, and as such we have considered it.

Richards seeks to foreclose said mortgage by advertisement under the provisions of the law of this Territory, and the bringing of this action is the result.

Can such a foreclosure proceeding be maintained? We think not. Section 313, of the Civil Code of this territory, provides:

“Where a power to sell real property is given to a mortgagee or other incumbrancer in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him *whenever the assignment is duly acknowledged and recorded.*”

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Section 598, chapter 28, of the Code of Civil Procedure, which confers the authority to foreclose this class of securities by advertisement, provides:

“To entitle any party to give notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite:

First.—“That some default in a condition of such mortgage shall have accrued by which the power to sell has become operative.”

* * * * *

Third.—“That the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all the assignments thereon have been duly recorded in the county where such mortgaged premises are situated.”

The primary object sought by the body of law-makers in placing such an enactment upon the statute, seems to have been to provide a proceeding which would be more speedy and less expensive than the ordinary court process; at the same time attaching the condition, that all mortgages and all assignments of the same, should first be recorded before the party could avail himself of this summary provision of the law above quoted. It would thus be, what the law-makers doubtless intended it should be—full and complete notice to all others who may have acquired an interest in the same property.

This would seem to be indispensable to render that proper and perfect protection which other parties would clearly be entitled to; and such was manifestly the purpose of the legislature when the plain and unequivocal enactment above set forth was adopted as a part of the law of the territory. No other intention is apparent.

If, then, such a record is essential, it follows as a matter of necessity that the assignment should be in writing. Neither of these requirements was met by the appellant in this case.

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Various other assignments in error appear from the record, but as the views already expressed seem to be fatal to the appellant's case, if any errors were committed by the learned Judge below, in the admission of evidence, it could not avail the appellant herein, and the same are not considered. The judgment of the District Court is,

AFFIRMED.

All the Justices concurring.

TERRITORY EX REL. GRAMBURG V. NOWLIN.

TERRITORY EX REL. CLARK V. SAME.

TERRITORY EX REL. MARTIN V. SAME.

1. TOWN-SITE ACT: DUTIES OF PROBATE JUDGE UNDER: NOT MINISTERIAL BUT JUDICIAL: MANDAMUS WILL NOT LIE. The duties of a judge of the probate court under the provisions of the Town-site Act of this territory (laws 1881, c. 135) are judicial and not ministerial in their character, and mandamus will not lie to review or reverse his decisions adverse to claimants, or to compel him to execute deeds to tracts of land occupied and claimed under said law, after he has rendered decisions upon such claims adverse to such claimants.

Appeal from the District Court of Pennington County.

All the necessary facts are stated in the opinion.

John F. Schrader & Chauncy L. Wood, for defendant and appellant, cited:

Laws of 1881, Sec. 12, Chap. 135; *Jones v. City of Petaluma*,

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36 Cal., 230; 2 Denio, 191; 1 id., 646; 2 Cow., 479; 5 Wait's Prac., 556-7, and cases cited; 78 N. Y., 39; 3 Abb. (N. Y.) Dig., 749 750; 7 id., 433; 8 id., 398.

J. W. Fowler and VanCise & Wilson, for plaintiffs and respondents, cited:

Merced Mining Co. v. Fremont, 7 Cal., 130; *Fremont v. Crippen*, 10 Cal., 211; *People ex rel. v. Loucks*, 28 Cal., 68; *Burbank v. Ellis*, 7 Neb., 156, 163; *Smith v. Pipe*, 3 Colorado, 187, 196; *Georgetown v. Glaze et al.*, ib., 230, 234; *Ming v. Truitt*, 1 Montana, 322-5; *Edwards v. Tracy*, 2 id., 49-55; *Hall v. Ashby*, 2 id., 489-92; *Platt v. Stout*, 10 Abb. Pr., 17; *People ex rel. v. Taylor*, 1 id. (N. S.) 205; *People v. Miner*, 37 Barb., 466; *Hill v. Supervisors, etc.*, 19 Johns., 259; 32 N. Y., 473; 51 N. Y., 401; 75 N. Y., 38; 68 N. Y., 114; 21 Cal., 669; 2 Cal., 165; 76 N. Y., 475; 47 Cal., 488; 79 N. Y., 189; 17 Cal., 132; 31 Cal., 215; 52 N. Y., 83; 39 Cal., 593; 23 Wis., 508; 4 Kan., 415; 2 N. W. Rep., 1106; 10 Cal., 212; 9 Cal., 365; 4 Denio, 137; 28 Cal., 69; 2 Wis., 507; 22 Barb., 502; 14 Ind., 93; 23 Mich., 270; 39 Cal., 189; 4 Minn., 312; 5 Ohio St., 535; 5 Cranch, 115; 5 Peters, 189; 7 Peters, 645; 12 Peters, 524; 1 Cranch, 137.

W. H. Mitchell, for respondent in *Martin* case, cited:

Code of Civil Proc., Sec. 695; 5 Peters, 189; 7 id., 645; 7 Cal., 130; 31 Cal., 215; 5 Cranch, 115; 2 Wis., 371; 7 Cal., 276; 50 Cal., 509.

CHURCH, J.—These three cases came before the District Court upon applications for writs of mandamus, to compel the probate

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judge of Pennington county to execute and deliver to the relators respectively, deeds for certain lands in Rapid City, claimed by them under the provisions of the territorial town-site law of 1881, chapter 135.

In the first two cases named alternative writs were first granted; in the case of *Marcena L. Martin* the matter came up on motion for peremptory writ in the first instance. Motions to quash the alternative writs were overruled; issues of fact were joined in all the cases, and they were tried to the Court without a jury, and judgment rendered in each case for the relators, and peremptory writs awarded. Motions for new trials were made and denied.

Numerous errors are assigned as grounds for reversal, only one of which, however, we shall consider since it involves a determination of the propriety of the remedy adopted in these cases, and in the view we have taken of it disposes of the matter.

By section 2387, of the Revised Statutes of the United States, whenever certain classes of public lands have been settled upon and occupied as a town site, it is made lawful, in case such town is not incorporated, for the judge of the county court in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of such trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated.

In pursuance of the authority thus conferred the legislature of this territory in 1881 passed what is known as the Town-site Act, (laws of 1881, chapter 135,) providing for the entry and disposal of

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lands for town site purposes. Section 4 of this act prescribes that the probate judge holding title to any such lands in trust under the act of Congress, "shall, subject to the provisions of this act, by a good and sufficient deed of conveyance, grant and convey the title to each and every block, lot, share or parcel of the same to the person, persons, associations or corporations who shall occupy or possess or be entitled to the right of possession or occupancy thereof, according to the several rights and interests of the respective claimants, in or to the same, as they existed in law or equity at the time of the entry of such lands, or to the heirs or assigns of such claimants."

Provision is then made for the ascertainment by the probate judge of the expenses of entry, survey, etc., and the assessment thereof upon the lots.

Section 7 then prescribes the method by which claims to lots shall be presented to the judge, viz: By a statement in writing containing an accurate description of the lot claimed, the specific right, interest or estate claimed, the character and value of the improvements thereon, the character and extent of the occupation and possession, and any other matter or thing illustrating or supporting such claimant's rights to a deed of the tract so described. This statement to be verified and presented to the probate judge

Section 9 provides for the determination of adverse claims by suit in the District Court.

Section 10 prescribes the extent of ground that may be claimed by any one claimant in a single tract, which, unless the claimant or his grantors were in the actual and peaceable possession of the same prior to the entry of the town site, and had improved the same, and was still in the occupancy thereof, might equal but not exceed two acres.

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Section 12 provides that at the expiration of a certain time therein mentioned, the probate judge shall proceed to award the lots, and for that purpose "shall examine each and every claim, "read proofs filed, and hear additional testimony, if deemed advisable; *and if the claim shall be found to comply with the provisions of this act*, and no adverse claim and notice of contest shall "have been filed, shall proceed to make such claimant a good and "sufficient deed of conveyance for such lot or lots or parcels so "claimed."

On June 6, 1878, application was made to the proper office by the then probate judge of Pennington county, to enter the town site of Rapid City for patent under the act of Congress and the then existing laws of the territory. This application was contested, but after a hearing in the local land office was allowed, and on appeal to the General Land Office and again to the Secretary of the Interior this decision was affirmed, the application allowed, and the entry completed July 8, 1881. Subsequently these relators filed their claims for certain large tracts of land within the town site, basing such claims respectively upon an alleged actual and peaceable possession and improvement prior to July 8, 1881, but not prior to June 6, 1878; and it would seem from the record that whatever rights the relators had in the premises accrued in the interval between these dates. Each of the tracts claimed was between thirty and forty acres in extent.

These claims were examined in their order by the probate judge and were by him rejected. Demand was made upon him to execute deeds of conveyance to the relators for the lots claimed by them respectively, and was refused. These demands were then put in writing, and upon presentation to the respondent were endorsed by him, "Demand refused; non-conformity to town-site law."

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The only question which we have deemed it necessary to consider is, whether mandamus was the appropriate remedy for the relators? and we think this question must be determined in the negative.

The District Court held that the duties of the respondent were purely ministerial, and that he was bound to execute deeds to the relators for the tracts occupied by them respectively, and in this we think the court erred.

An examination of the statute will show that in passing upon the claims presented the respondent was required to exercise functions clearly of a judicial character. He was called upon to determine whether the character and extent of the occupancy and improvement were such as to entitle the claimants to the tracts claimed. He was to determine when that occupancy had its legal beginning, and whether this was prior or subsequent to the entry of the town site; and he was empowered *to hear additional testimony*, if deemed advisable, and finally to determine whether or not the claims complied with the provisions of the act. In the exercise of the duty thus imposed upon him the respondent found in terms that the claims of the relators did not conform to the law, and we do not think his decision can be reviewed by mandamus.

Of course we will not be understood as holding that these duties derive any judicial character from the fact that the respondent was the judge of the probate court; that circumstance merely designates him as the proper trustee in this case. Had the city of Rapid been incorporated at the time of the town-site entry the corporate authorities would have been the trustees. The duties of the trustee derive their character from the provisions of the town-site act.

In the case of *Francis v. Common Council of Troy*, 78 N. Y., 33, the Court of Appeals after declaring that the writ of man-

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damus is not a remedy for an erroneous decision, say: "This principle applies to every case where the duty, the performance of which is sought to be compelled, is, in its nature, judicial, or involves the exercise of judicial power or discretion irrespective of the general character of the officer or body to which it is addressed. * * Where a subordinate body is vested with power to determine a question of fact, the duty is judicial; and though it can be compelled by mandamus to determine the fact, it cannot be directed to decide in a particular way, however clearly it be made to appear what the decision ought to be."

The general rule is so well stated by Mr. High (Ex. Leg. Rem., Sec. 42.) that we here reproduce it: "We come next to the consideration of a fundamental rule, underlying the entire jurisdiction by mandamus, and especially applicable in determining the limits to the exercise of the jurisdiction over public officers. That rule is, that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion, or to determine upon the decision which shall be finally given. And wherever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action, they are required to exercise any degree of judgment. While it is proper by mandamus to set them in motion, and to require their action upon the matters officially entrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion, nor attempt by mandamus to control or dictate the judgment to be given. Indeed, so jealous are the courts of encroaching in any manner upon the discretionary powers of public officers, that if any reasonable doubt exists as to the question of discretion or want of discretion they will hesitate to interfere, preferring rather to ex-

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“tend the benefit of the doubt in favor of the officer.” See, also, sections 34, 174 and 278, of the same work.

To the same effect, also, are *Howland v. Eldridge*, 43 N. Y., 456; *Francis v. Common Council of Troy*, 78 N. Y., 33; *Gibbs v. Coms. of Hampden Co.*, 19 Pick., 298; *Chase v. Blackstone Canal Co.*, 10 Pick., 244; *U. S. v. Seaman*, 17 How., (U. S.) 225. The last mentioned case was one in which a mandamus was sought to compel the superintendent of public printing to deliver certain papers to the printer of the Senate to be printed. Whether these papers should be delivered to the relator or to the printer of the House involved the determination of two questions:

First.—Whether they really constitute part of a document already assigned to the printer of the House; and

Second.—In which House the order to print was first passed.

The Supreme Court, without passing upon these questions, say: “The rule to be gathered from all of these cases is too well settled to need further discussion. It cannot issue in a case where judgment and discretion are to be exercised by the officer; and it can be granted only where the act required to be done is merely ministerial, and the relator without any other adequate remedy.”

“Now it is evident that this case is not one in which the superintendent had nothing to do but obey the order of a superior authority. He had inquiries to make before he could execute the authority he possessed. He must examine evidence; that is to say, he must ascertain in which house the order to print was first passed, * * * and after he had made up his mind upon this fact it was still necessary to examine into the usage and practice of Congress, * * * and to make up his mind whether separate communications upon the same subject or on different subjects, from the same office, when made at differ-

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“ent times were, according to the usages and practice of Congress, described as one document, or as different documents in printing and publishing their proceedings. He was obliged, therefore, to examine evidence and form his judgment before he acted; and whenever that is to be done, it is not a case for mandamus.”

We cannot distinguish this case in legal principle from the one before us. See, also, *Secretary v. McGarrohan*, 9 Wall., 298, and cases cited.

It is worthy of remark that by the thirteenth section of the act of 1881, it is provided that any lots which shall remain unclaimed after the expiration of the time limited for filing claims, shall be devoted to the school fund of the towns, and no method seems to be provided by which this school fund may be protected against improper claims which may be presented for lots in the town site, except the exercise of a wise and careful discretion by the trustee in passing upon all claims filed.

The judgment of the District Court in all these cases must be reversed, and the peremptory writs of mandamus heretofore awarded by that court, set aside.

EDGERTON, C. J., dissenting.

TERRITORY EX REL. SMITH, DISTRICT ATTORNEY V. SCOTT ET AL.

1. **TERRITORIAL LEGISLATURE: LEGISLATIVE POWERS OF: IN WHAT SENSE DELEGATED.** The investiture of the territorial legislature with legislative powers, is to be regarded as a delegation of authority in the same general sense only in which the powers of Congress are considered to be delegated by the people. And such powers are, within their proper scope, to be exercised by

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the territorial legislature in the same manner as like powers may be exercised by other legislative bodies, state and national.

2. **RELOCATION OF CAPITAL: LEGISLATIVE POWER IN: HOW EXERCISED.** That clause of section 12, of the Organic Act of this territory, which provides that the location of the territorial capital "shall thereafter be subject to be changed by the said governor and legislative assembly," is not to be regarded as either an enlargement or a limitation of the general legislative powers conferred upon the territorial legislature, but as a declaratory provision inserted by way of precaution. And whether considered as pertaining to the strictly law-making functions, or to those administrative functions belonging to every legislature, this power could be properly exercised in the form of a legislative act, as such functions are usually exercised by legislative bodies.
3. **SAME: LEGISLATIVE FUNCTIONS: CANNOT BE DELEGATED: ADMINISTRATIVE, MAY.** Prescribing by law that a change of the location of the seat of government shall be made, and a new location selected, and the mode in which this shall be accomplished, would seem to pertain closely to the law-making function, which cannot be delegated. But the actual selection of a suitable location, and the erection of buildings and improvements thereon are clearly acts of an administrative character.
4. **LEGISLATIVE ACT VALID.** The provisions of the act for the selection by commissioners of a suitable location for the seat of government, and for the erection thereon of the necessary buildings and improvements, are a lawful and proper exercise of legislative authority, and the act in question is valid and operative.
5. **NAMING COMMISSIONERS IN THE ACT: NOT IN CONFLICT WITH SECTION 1857, U. S. REVISED STATUTES: NOT OFFICERS.** The officers contemplated by section 1857, U. S. Revised Statutes, and who are required to be nominated by the governor, and by and with the advice and consent of the legislative council, appointed, are those continuously employed in the regular and permanent administration of government, and by whom the territory performs its usual political functions. The duties to be performed by these commissioners are of a temporary character; their functions wholly cease with the completion of those duties, and they cannot be regarded as officers within the meaning of the section of the Organic Act referred to. Hence the designation by name, of the commissioners in the act itself was lawful.

William F. Vilas, W. P. Clough and Alexander Hughes, for appellants. Points and authorities:

It is necessary for the assailants of this act to establish two

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propositions: that law-making power is delegated; and, that the act is, therefore, invalid. Neither of these propositions can be rightfully affirmed.

The Organic Act, and the Revised Statutes, to the extent they supersede it, stand as the constitution of the territory—its charter of government: *Ferris v. Higley*, 20 Wall., 380, 381.

While it is the acknowledged duty of the court, when the occasion arises, to declare an act of the legislature invalid, no doctrine of the law is better settled than that the necessity must be plain, undeniable, and unavoidable, in order to justify such action: *Fletcher v. Peck*, 6 Cranch, 87; *Wellington et al. v. Petitioners, etc.*, 16 Pick., 87; *Com. v. Blackington*, 24 Pick., 352; *Clark v. City of Rochester*, 24 Barb., 470-71; *Railroad Co. v. Commissioners*, 10 Ohio St., 77; 20 Ohio, appendix "A."; *Bridges v. Shalloross*, 6 W. Va., 562; *Ogden v. Saunders*, 12 Wheat., 270; *Derby Turnpike Co. v. Parks*, 10 Conn., 522; *Adams v. Howe*, 14 Mass., 340; *Ex-parte McCollum*, 1 Cow., 550, 564; *Cochrane v. Van Surley*, 20 Wend., 365, 382; *Morris v. People*, 3 Denio, 381, 394; *Fisher v. McGirr*, 1 Gray, 1, 21; *Commonwealth v. Williams*, 11 Pa., 61, 70, 71; *State v. Cooper*, 5 Black., 258; Cooley on Const. Limitations, 159, 160.

It is generally laid down in text books that the power of *making laws* cannot be delegated by the body in which that power is reposed: Cooley on Const. Lim., 116. But if any one asserts this rule to forbid the legislature to commit to others all things, or anything, which it may constitutionally perform itself without mediation, he will find himself instantly confronted by an overwhelming mass of precedents, both those which have been judicially upheld and those which by long and repeated practice have equally as great force. He will find Congress to have delegated most important functions; the legislatures of the states to have

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done the same, and the legislatures of the territories. So frequent, so many and so important delegations of the functions which a legislative body may exercise, will present themselves, that the rule, if rule it be, will be found so restricted by undeniable limitations and exceptions, that it is in very rare instances only when it can be applied. The necessities of this case demand no attack upon the principle; it is so clearly within recognized and established limitations that these alone require to be shown.

Congress takes its powers by delegation quite as much or more, than a state legislature, and a state legislature takes its powers no less by delegation than a territorial legislature. All are simply legislative agents of the sovereignty, and if the principle applies, according to the assumed reason of it, because power is delegated, it applies as much to one as to another, the reason and the rule extend alike to all.

Congress has only such powers as have been *granted* to it; whatever is not granted is denied: . Cooley on Const. Lim., 173. Congress has power to legislate over the territories: *American Ins. Co. v. Canter*, 1 Peters, 511; *National Bank v. County of Yankton*, 11 Otto, 129.

Yet every Organic Act for territorial government is a delegation of legislative power which Congress might itself directly exercise: See, also, Rev. Stats., U. S., relating to the District of Columbia, pp. 1 to 149. Grant of authority to the President to call forth militia, 1 Stat. at Large, 424. Sustaining this statute, *Martin v. Mott*, 12 Wheat., 19. Congress has delegated to the President its power, in *his* discretion to raise an army: 1 Stat. at Large, 367; *id.*, 558; *id.*, 223, Sec. 7; *id.*, 243, Sec. 13.

Congress has power to grant letters of marque and reprisal: but granted its power to the President: 2 Stat. at Large, 755. Congress has power to borrow money, but authorized the President

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to cause it to be borrowed, etc.: 1 Stat at Large, 187; and other instances on pp. 345, 461, 488, 534, 551, 607, 609.

So to make rules for the government of the land and naval forces: 1 Stat. at Large, 569, Secs. 1, 2, 3, 4. Another delegation of like power: 2 Stat. at Large, 819.

By act of July 17, 1862, the President was authorized to make needful rules and regulations in respect to enrolling the militia—affirmed, *In re Griner*, 16 Wis., 423; *In re Wehlitz*, ib., 443; *Druecker v. Solomon*, 21 id., 621.

So Congress authorized the Supreme Court of the United States to modify and add to laws adopted: 1 Stat. at Large, Ch. 36, Sec. 2, and the legality of this action was passed upon in the case of *Wayman v. Southard*, 10 Wheaton, 1; see, also, *Golden v. Prince*, 3 Wash., C. C., 313. As to the exclusive power of Congress to suspend the writ of *habeas corpus*, *Kemp. in re*, 16 Wis., 359. As to the constitutionality of the act of Congress, authorizing the President to suspend the writ, see *In re Oliver*, 17 Wis., 681.

The power of eminent domain is one of the highest prerogatives of the state, peculiarly appertaining to the legislature: Cooley's Const. Lim., 528, 530. Yet by legislation, long since too frequent for citation, legislatures have delegated this power, sometimes to individuals and sometimes to corporations.

It is within the legislative power to pass laws for the government of people in cities, villages, and boroughs and towns. But delegation of this power to common councils, boards of trustees, supervisors, selectmen and the like, enabling them to enact ordinances or by-laws, having all the force of acts of the legislature, is universal: *State v. Noyes*, 30 N. H., 279; *State v. Simonds*, 3 Mo., 414; *Tanner v. Trustees of Albion*, 5 Hill, 121, 131; *City of Patterson v. Society, etc.*, 24 N. J. L., 385; *Cole v. Schulz*, 47 Barb., 64.

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Another class of cases uphold the power of the legislature to authorize school districts and towns and counties to determine by vote whether schools shall be organized, or particular systems of school government adopted: *State v. Wilcox*, 45 Mo., 458; *Bull v. Read*, 13 Gratt., 78.

Referring the operation of law to local vote on subscriptions to aid railroads: *Hitchcock's Opinion*, 20 Ohio, appendix "A."; *Marshall v. Donovan*, 10 Bush., (Ky.) 681; *State v. Binder*, 38 Mo., 450; *Bridgeport v. Housatonic R. R.*, 15 Conn., 475; 8 La. Ann., 341; 9 id., 561; Cooley's Const. Lim., p. 119, note. So the laws making organizing of counties dependent upon popular vote, have been universally sustained: *People v. Reynolds*, 5 Gilman, 1; *Upham v. Supervisors*, 8 Cal., 378; *Kayser v. Bremen*, 16 Mo., 88; *State v. Weatherby*, 45 Mo., 17; 55 Mo., 295.

Laws authorizing taxes, to be levied in case of a favorable vote, have been sustained universally: *Burgess v. Pue*, 2 Gill., (Md.) 11 and 254; *Steward v. Jefferson*, 3 Harr., 335; *People v. Solomon*, 51 Ill., 37; *Alcorn v. Hamar*, 38 Miss., 652; *Weaver v. Cherry*, 8 Ohio St., 564; 42 Conn., 583; 9 Am. and Eng. R. R. cases, 385; *Corning v. Green*, 23 Barb., 33; *People v. Stout*, id. 349.

The following states have denied the constitutional validity of "local option" liquor laws: *Delaware*, 4 Harr., 479; *Indiana*, 4 Ind., 342; 11 Ind., 482; *Texas*, 17 Tex., 441; *California*, 48 Cal., 279; *Iowa*, 2 Ia., 165; 5 Ia., 491; 9 Ia., 203; 33 Ia., 134; 3 R. I., 33.

Such laws have been sustained by: *Pennsylvania*—8 Pa. St., 391; 10 Pa. St., 214; 21 id., 188; 56 id., 359; 72 id., 491; *Vermont*, 21 Vt., 456; 26 Vt., 357; *New Jersey*, 36 N. J. L., 72; S. C. 13 Am., 422; *Maryland*, 1 Md., 128; 25 Md., 541; 42 Md., 71; 2 Gill., 254; *Kentucky*, 14 Bush., 218; S. C. 29 Am., 407;

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Minnesota, 24 Minn., 247; 31 Am., 344; *Connecticut*, 42 Conn., 364; *Massachusetts*, 24 Pick., 352; 108 Mass., 27; 110 Mass., 357; *Michigan*, 3 Mich., 343; 3 Mich., 330.

In *Barto v. Himrod*, 8 N. Y., 483, it was held that the legislature could not leave the enacting of a law to the people. In *Thorne v. Cramer*, 15 Barb., 112, the same view of the law was taken, and in *Johnson v. Rich*, 9 Barb., 680, another bench of that court sustained the act. In *Bank of Rome v. Village of Rome*, 18 N. Y., 38, the Court of Appeals distinguishes *Barto v. Himrod*, as authority only with respect to a law referable to the whole people, but sustains a law depending upon a local vote. But the greater weight of authority is against *Barto v. Himrod*: *Smith v. City of Janesville*, 26 Wis., 291; *State ex rel. v. O'Neil, etc.*, 24 Wis., 149; *State v. Barker*, 26 Vt., 357; *Bull v. Read*, 13 Gratt., 78; *State v. Wilcox*, 45 Mo., 458; *Alcorn v. Hamar*, 38 Miss., 652; *Opinion of Judges*, 55 Mo., 295; *People v. Solomon*, 51 Ill., 37; *People v. Reynolds*, 5 Gilman, 1; *Kayser v. Bremen*, 16 Mo., 88; *Upham v. Supervisors*, 8 Cal., 378; 20 Ohio, appendix "A.;" *Weaver v. Cherry*, 8 Ohio St., 564; *Erlinger v. Boneau*, 51 Ill., 94; *Holcomb v. Davis*, 56 Ill., 413; *Burgess v. Pue*, 2 Gill., 11; *Marshall v. Donovan*, 10 Bush., 681.

The first broad distinction, which would naturally occur to any intelligent reasoner, relates to the nature of the powers possessed by the legislature. These are the powers of administration, as they may be called, in distinction from the powers of legislation. This distinction was at an early day remarked by the illustrious MARSHALL in the case of *Wayman v. Southard*, *ante*; and, also, *In re Griner*, 16 Wis., 423; *Slack v. M. & L. R. R. Co.*, 13 B. Monroe, 1, at pp. 22, *et seq.*; *People v. Collins*, 3 Mich., 400; *People v. Reynolds*, *ante*.

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Another qualification or exception to the general undefined doctrine, is equally well settled by the authorities which have been collected. It is, that any law, general or special, may be enacted in such terms that its operation and effect depend, in whole or in part, upon some future action or contingency, and that such contingency may involve the discretion or judgment of others. And this is especially true of some single provision or detail of the act, which, from the nature of it, the legislature could not wisely or advantageously for the public interests so well predetermine as to leave to other judgment.

The legislature exercised its rightful function to "change the seat of government." The act declared the seat of government to be located and established at a place to be determined upon in the future, and fixed certain efficient machinery for the necessary determination within a limited time, of the place to which the seat of government was changed, and declared that place, then certainly contemplated and known in the eye of the law, to be the seat of government. There was a contingency in this, precisely such a contingency as the legislature had power to create by this law: *Upham v. Supervisors*, 8 Cal., 378; *People v. Reynolds, supra*; *Commonwealth v. Painter*, 10 Pa. St., 214. County seats have been thus located in Iowa, Missouri, Kansas, Ohio, Indiana, Illinois; and in at least five instances—Montana, Colorado, Iowa, Illinois and Nebraska, state and territorial capitals have been located in pursuance of a delegation of choice by the legislature to others.

The location of the national capital furnishes a final example of the delegation of such authority. Congress was certainly vested with that power. It also as plainly delegated it, to a great extent, as any act which was ever passed in a similar case: Chap. 28, 1 Stat. at Large, page 130.

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Territories are states in embryo, and the political power of self-government which the people in the territory possess, though derived by grant from Congress, is much more analogous to that of states, than of counties in states. It is simply puerile to liken the executive department of the territorial government to the president of a village, its legislature to a board of village trustees, and its system of courts, with this court at its head, to a justice of the peace with police jurisdiction within the borough. The territorial legislatures, under the grant of power over "all rightful subjects of legislation," exercise substantially the same power as state legislatures. They may *create* counties, cities, villages, boroughs, and may invest them, by delegation to them, with all the functions which such corporations and political subdivisions usually possess. Are all such acts invalid because a common council cannot create a city within itself, or because a county government cannot do the same? The legislature of Dakota in innumerable instances has done these things, and are all these acts to be declared void?

Another and independent ground was taken, not indeed against the validity of the act in question, but against the validity of the appointment of these appellants under the act; that the appointment of commissioners in the act was in conflict with section 1857, Revised Statutes, U. S.: "All township, district and county officers, except justices of the peace and general officers of the militia, shall be appointed or elected in such manner as may be provided by the Governor and legislative assembly of each territory; and all other officers not herein otherwise provided for, the Governor shall nominate, and by and with the consent of the legislative council of each territory, shall appoint, etc."

It may be readily conceded that, in a very general sense, these commissioners are officers—because they discharge an office or duty which is public. The section above referred to manifestly relates

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to those officers who are charged with regular and permanent duties in the administration of the continuing affairs of government, and not to those temporary and occasional employments for special purposes which circumstances of a peculiar nature sometimes give rise to. The distinction mentioned has been recognized in every judicial decision throughout the country which has touched upon this subject; and long continued practice, both in the states and territories, has also given added sanction to it. A leading case is *Com. v. Sutherland*, 3 Ser. & R., 145; *Shepherd v. Commonwealth*, 1 Ser. & R., 1; *Com. v. Bussier*, 5 Ser. & R., 451; *Com. v. Binns*, 17 Ser. & R., 219; *United States v. Hatch*, 1 Pinn., 182. In the last case almost this identical question arose in the Supreme Court of Wyoming: *Sheboygan County v. Parker*, 3 Wall., 93; *State v. Kennon*, 7 Ohio St., 546; *Branham v. Lange*, 16 Ind., 497; *Bridges v. Shallcross*, 6 W. Va., 562; *In re Hathaway's will*, 71 N. Y., 238; *People v. Palmer*, 52 N. Y., 83; *Attorney General v. Squires*, 14 Cal., 12; *People v. Hurlburt*, 24 Mich., 62-4, 93-4; *Mayor v. State*, 15 Md., 376; *People v. Bennett*, 54 Barb., 480; *Conroy v. Copland*, 4 La. An., 307; *State v. Wilmington C. C.*, 3 Harr., (Del.) 294; *Appendix No. 2*, 3 Me. Rep.; *People v. Nichols*, 52 N. Y., 478.

If it were granted that the Governor had the right of appointment, with the concurrence of the legislative council, the court could not dispute that the concurrent action of both the Governor and the council did name these officers. No valid objection can be taken upon the fact that their nomination was suggested in the legislative assembly. The court will not oust officers whose appointment is substantially correct, on a mere technicality: *Park's relation*, 3 Mont., 426; *Rankin v. Hoyt*, 4 How., 327.

This case was triable by a jury. It is a *quasi* criminal prosecution, although in form a civil action. It might result not only in

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dispossessing defendants of their offices, but also in inflicting a fine upon them: *State ex rel. Wood v. Baker*, 38 Wis., 71. The common law writ of *quo warranto* was always triable by jury. This action stands in the same right. Therefore the case was not properly noticed for a special term without a jury. It was not rightfully on the calendar and should have been struck off: *People v. Alb. & Sus. R. R. Co.*, 57 N. Y., 161.

But it was said no issues were presented by the pleadings. This is manifestly incorrect from a mere examination of the pleadings. Some important averments in the complaint are expressly denied, others stand denied by the rules of pleading laid down in the Code. It is contended these were immaterial, because the act itself was unconstitutional. This required the court to predetermine the right to judgment to permit the cause to remain on the calendar and entertain the motion for judgment.

A demurrer to the answer should have been interposed, and having been noticed for trial would have raised the question.

Bartlett Tripp, G. C. Moody, Gamble Bros. and E. G. Smith, District Attorney, for respondent. Points and authorities in brief:

We first invite the attention of the court to the proposition that there was no power in the Governor and legislative assembly to change the seat of government by the appointment of commissioners to whom was delegated the power of naming the location to which the seat of government should be removed, and providing for the erection of a capitol building, etc. And first let us inquire what kind of a power was vested in the Governor and legislative assembly to change the seat of government.

Is it a legislative, or administrative power? It would seem from the argument on the part of appellants, to be claimed as an administrative power, because if the power so conferred is a legis-

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lative one, (whether it is a delegated or original legislative one) under the Organic Act the Governor and legislative assembly would have no power to delegate it to commissioners to be exercised. Mr. Cooley lays it down as a settled maxim that power conferred upon the legislature to make laws cannot be delegated: Constitutional Limitations, p. 138.

In support of this doctrine, he cites: *Thorn v. Cramer*, 15 Barb., 112; *Bradley v. Baxter*, 15 Barb., 192; *Barto v. Himrod*, 8 N. Y., 483; *People v. Stout*, 23 Barb., 349; *Rice v. Foster*, 4 Barb., 479; *Santo v. State*, 2 Iowa, 165; *Geebrick v. State*, 5 Iowa, 203; *State v. Weir*, 33 Iowa, 134; *People v. Collins*, 3 Mich., 343; *R. R. Co. v. Com'rs, Clinton Co.*, 1 Ohio St., 77; *Parker v. Com.*, 6 Pa. St., 507; *Com. v. Williams*, 11 Pa. St., 61; *Maize v. State*, 4 Ind., 342; *Meshmeier v. State*, 11 Ind., 482; *State v. Parker*, 26 Vt., 357; *State v. Swisher*, 17 Texas, 441; *State v. Copeland*, 3 R. I., 33; *State v. Wilcox*, 45 Mo., 358; *Com. v. Locke*, 72 Pa. St., 491; *Ex-parte Wall*, 48 Cal., 279; *Willis v. Owen*, 43 Texas, 41; *Farnsworth v. Lisbon*, 92 Me., 451; *Brewer Brick Co. v. Brewer*, 62 Me., 52; *State v. Hudson County Com'rs.*, 37 N. J., 12; *Auditor v. Holland*, 14 Bush, 147. The question has arisen in a variety of ways. In *Houghton v. Austin*, 47 Cal., 647, it was attempted to delegate the power to fix the rate of taxation. Some courts have gone to a great extent, as in the case of liquor laws, to save some act of legislation, by holding that under the particular facts of the case it was not a delegation of power, but a statute to take effect upon the happening of a contingency. But in every instance it will be found that the reasoning of the court is confined to the facts of the particular case; and if it is found that the law was not complete when it left the legislative hands, but was left to the people to determine upon its expediency, or determine upon any fact which was to make the act law, the courts have held that it was a delegation of legislative

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power, and void: *Ex-parte Wall*, 48 Cal., 279, 315; *Lannert v. Lidell*, 62 Mo., 188; Cooley's Const. Lim., 143; *State v. Young*, 29 Minn., 474.

The act under consideration cannot be said to come within any of the exceptions of delegation of legislative power; it is not a local, or option law, or a police regulation; nor can it be seriously claimed to be a law when it came from the legislature, perfect in itself, to take effect and be in force upon a contingency. If so, what contingency? The recital of the "removal" of the capital, in the first section of the act must be construed with the other sections of the act, and we find that it no where names the place to which the capital is removed. The only question of expediency upon which the legislative assembly and governor passed, was that the capital should be removed from Yankton. Was the question of the expediency of the place to be selected, its location with reference to the future interests of the territory, and of the people, at all taken into consideration or passed upon by this enactment? It follows that the act left to these nine commissioners the power of selection and location of the capital. The only contingency upon which this law depended to carry it into effect was the very *act* of the commissioners, to-wit: the act of locating or changing the seat of government. If they changed it, the contingency happened; if they failed to locate or change the seat of government, the contingency did not happen. Compare this contingency with that in *State v. Young* (29 Minn.) Our case would be somewhat parallel if the legislature had removed the capital from Yankton and located it at Bismarck or Fargo, as the commissioners might determine—a case in which the legislative discretion and judgment had been exercised in rejecting every other city except these two places. Yet within the Minnesota case the legislative judgment and discretion must have been exercised upon each of these.

So much upon the theory that the power delegated was a legis-

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lative one. But if we understand the arguments of appellants' counsel correctly, it is not claimed that the power delegated was of the legislative, but was of administrative character. The authorities cited and relied upon by counsel are all cases of delegation of administrative power.

As to the reluctance of courts to declare an act unconstitutional: Courts are to act upon such a question unhesitatingly and fearlessly. It does not differ in principle from the question whether or not a later enactment repeals an earlier one. There is only this difference: that in determining whether the later act is in conflict with the prior enactment of the same body, in case of doubt, the later act is to prevail; while in determining whether a law is in conflict with a fundamental law, in case of doubt the fundamental or organic law is to prevail: *Oakley v. Aspinwall*, 3 N. Y., 568; *Dwarris on Statutes*, 365.

The power to relocate the seat of government is not placed among the general legislative powers granted the territory by section 1851, extending to "all rightful subjects of legislation not inconsistent, etc," but is found in another and separate section, giving it thus a certain prominence. In the first instance the power was conferred upon the Governor alone, to name the time and place of holding the first legislative assembly. It thus later becomes a special duty, whether administrative or legislative, but partaking in its character perhaps somewhat of both—conferred upon the Governor and legislative assembly, to locate the seat of government and change the same.

Can such duty, if an administrative one, conferred upon these two bodies, be delegated by them? A trust can only be executed by the one to whom it is confided: *Maxwell v. Bay City Bridge Co.*, 2 N. W. Rep., 639; *Clark v. Washington*, 12 Wheat., 54; *Thompson v. Schermerhorn*, 6 N. Y., 92; *Davis v. Reed*, 65 N. Y.,

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556; *Supervisor v. Brush*, 77 Ill., 59; *Thompson v. Boonville*, 61 Mo., 282; *State v. Patterson*, 34 N. J., 168; *Hyde v. Jones*, 4 Bush., 464; *Oakland v. Carpenter*, 13 Cal., 540; *Whyte v. Nashville*, 2 Swan, 364.

We understand that a delegated power involving judgment and discretion cannot be delegated; that the rule is inflexible, and there are no exceptions.

If disputed, it would require no argument to show that the power conferred on the Governor and legislative assembly over the changing of the seat of government is one involving judgment and discretion. It was one which Congress chose to separate from all the other powers conferred upon the Governor and legislative assembly, and to prominently mention in a separate section. What is a delegated power? The word comes into our language with much of its original force; the word itself presupposes some higher, original power. It does not mean a severing and transmission of a part of the higher, original power, to another, to be used and exercised by him of his own independent will and volition, but it means a power belonging to a person, temporarily used or employed by his agent, or person selected by him to use for the benefit of the person to whom the power belongs, and subject to his control. It is never disassociated from agency. The maxim grew out of the principle and law of agency. The act is that of the principal, not that of the agent. The moment the power of revocation is lost there is no longer a delegated power. It seems that the argument of the learned gentleman for the appellants is based upon a wrong premise. He blends delegated and original or sovereign power. He says the sovereign power is in Congress, so far as the territory is concerned. We admit it. Then the power which Congress has conferred upon the territory is a delegated one. He says all sovereign power is in the people; that is true in an abstract sense, but it is that residuum of original or

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sovereign power that was not surrendered at the formation of the state and national governments. What is sovereign power? Blackstone says it is "the making of laws," "and all the other powers of the state must obey legislative power," etc.: 1 Blackstone, 49. It was that sovereignty that made parliament omnipotent. Under our view of sovereignty all power is not in the legislature. Each department of our governments is independent of the other, and the sovereign power of the state and nation, is divided into three great departments or classes, the executive, the judicial and the legislative, and each is sovereign only in its sphere: Rapalje Law Dict.; 1 Story Const., 207; Cooley Const. Lim., 1 and 2.

A sovereign power is one that admits of no superior. It has been settled by the highest court—the decision of war—that we are a nation; that when the compact or confederation of the states was made it was for all time; not dependent upon the will of the states, or of the people. The powers granted to the national government, and to the states, cannot be said to have been delegated; a better term would be that they were surrendered. Legislative powers when possessed by legislatures and by Congress, no longer exist in the people, as such. The states cannot so modify their fundamental law as to abolish their governments, or make them unrepresentative in form. They have also in the creation of their state and national governments temporarily surrendered all their rights. The people as such have no power of legislation nor any other sovereign power, however gross or unjust might be the law of any state. The people of the whole state have no more right to resist the execution of a law than do the people of a particular city or county; and if the whole people of the state were to take into their hands the resisting of the execution of a murderer, or attempt to condemn and hang some defendant, they would be as much in rebellion as though they were but a few citizens of a city

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or county; the acts of the many would be as much riotous and rebellious as the acts of the few.

The sovereignty that rests in the people is an abstract sovereignty. The actual, existing sovereignty, so far as legislative and administrative powers are concerned, is deposited in the three great departments of government. The people as such never had any legislative and administrative powers. They sprang into existence at the birth of the state and nation. The powers of a state or nation cannot antedate its birth. The people never delegate powers, within the legal meaning of the word. They may create governments with powers, but the people of the United States never had any powers to delegate.

The powers which are now national sovereign powers were a surrender of so much of the state power as had become sovereign by successful revolution. No portion of the people, however large, can interfere with the regular working of the agencies of government: *Cooley Const. Lim.*, 598; *Gibson v. Mason*, 5 Nev., 283-291; *Cooley Const. Lim.*, 747.

The powers then, as they exist in the state and national government are original and sovereign powers. The legislature may exercise or delegate any of its powers except so far as it is limited by the express words of the constitution. The legislatures of the states, and Congress, cannot delegate their legislative powers, because it is impliedly prohibited by the terms of the constitution; and on grounds of public policy it has long been held that such powers, though original, cannot be delegated. But all such powers not in terms or impliedly prohibited by the constitution, may be delegated. Hence, whenever the legislative, executive or judicial departments of the government have imposed upon them duties not strictly legislative, executive, or judicial, and which they are not by the terms of the constitution prohibited from delegating,

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they may do so, even though the powers delegated involve judgment and discretion. Hence it is that in all the cases in which this question has arisen as to the power of Congress or of the state legislatures, to delegate any of their powers, the turning point in each case is, is it a legislative delegation? If legislative it is not susceptible of delegation: *In re Griner*, 16 Wis., 433; *In re Wehlitz*, 16 Wis.; *Druecker v. Solomon*, 21 Wis.

The court, *in re Griner*, with some hesitation, arrives at the conclusion, in the particular case, that the act of Congress giving the President power to make all necessary rules and regulations to carry into effect the law for calling out the militia, was not a delegation of legislative, but of administrative power, which Congress under its sovereign and original authority, might delegate to the executive. No one will doubt that an original power carries with it the right to delegate it, and laws delegating all others of the original powers, either of state legislatures or of Congress, not legislative, nor directly or impliedly prohibited by the terms of the constitution, have been sustained. This will explain very many of the illustrations and decisions cited by counsel. In the original or sovereign power all rights are implied for it. In the delegated power nothing is implied, and the terms of the grant are strictly construed. What are the powers possessed by the legislature of Dakota, and was the power to change the seat of government, expressly and in direct terms imposed upon the Governor and legislative assembly, a legislative or an administrative power? The argument of counsel is, that the people have delegated to Congress powers to govern, and Congress has delegated to the territories; so that the legislature of Dakota takes its powers two degrees removed from the people. So it is conceded that all the powers possessed by the Dakota legislature and executive, are delegated powers. Were there any doubt upon this question the Supreme Court of the United States has set it at rest, in *American*

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Ins. Co. v. Canter, 1 Peters, 542-3; *National Bank v. Yankton County*, 101 U. S., 132-3. Are not all the powers vested in the territorial legislature by the Organic Act, delegated powers, strictly within the decisions of the Supreme Court just cited? Is it not a temporary loan of the sovereign powers of Congress? It is true the power of legislation given by the Organic Act is full and ample, but it is subject to instant recall or constant change.

Every one of the powers exercised in the many instances of legislation cited by counsel, is expressly granted by the Organic Act, and this "outlying domain" of the United States has, then, no original or sovereign powers of legislation, but all its powers are delegated to it by Congress; and all of the powers so delegated, involving judgment and discretion, cannot be redelegated by the agents to whom they are intrusted: *Ruggles v. Collier*, 43 Mo., 351, 377; *Farmers' Loan & Trust Co. v. Carroll*, 5 Barb., 649; *Thompson v. Schermerhorn*, 2 Selden, 92; *Thompson v. City of Boonville*, 61 Mo., 282; *Lauenstein v. City of Fondulac*, 38 Wis., 336-9; *State v. Hastings*, 10 Wis., 525, 553; *Lord v. City of Oconto*, 2 N. W. Rep., 785; *Mullarky v. Town of Cedar Falls*, 19 Ia., 21; *Gale v. Kalamazoo*, 23 Mich., 344; *Milhan v. Sharpe et al*, 17 Barb., 435; *Meuser v. Risdon et al*, 36 Cal., 239-44; *Clark v. Washington*, 12 Wheat., 40-54; Cooley's Const. Lim., 249, (Marg. 204;) *Cornell v. State*, 6 Lea., 624.

If, instead of the law placing the power in the Governor and legislative assembly, Congress had placed the power to locate and change the seat of government, in the hands of *commissioners*—which it clearly could have done—would it be seriously contended that such commissioners could have delegated that power to others? Or if such power had been vested in the Governor alone, could he have farmed out or sublet the trust reposed in him? Corporations are enjoined from disposing of their franchises so as to disable

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themselves from operating their lines, unless expressly allowed to do so by their articles of incorporation: *Thomas v. Railroad Co.*, 101 U. S., 71-83.

Legislatures are not deemed to delegate legislative power to municipalities, "because the regulation of such local affairs as " are commonly left to local boards and officers is not understood " to belong properly to the state; and when it interferes, as some- " times it must, to restrain and control the local action, there " should be reasons of state policy or dangers of local abuse to " warrant interposition: *Cooley Const. Lim.*, 229; *Com. v. Turner*, 1 Cush., 493-5; *State v. Noyes*, 10 Foster, 279; *Bancroft v. Dumas*, 21 Vt., 456; *Tanner v. Albion*, 5 Hill, 121; *State v. Simonds*, 3 Mo., 414; 108 Mass., 27-29; *Com. v. Dean*, 110 Mass., 357; *State ex rel. v. Court C. P.*, 36 N. J. L., 72; 13 Am. Rep., 422; *Lock's appeal*, 72 Penn. St., 491; S. C. 13 Am. Rep., 716. Local option laws may properly be classed—not as examples of delegated power—but as coming simply within the authority of municipal or police regulation: *Cooley Const. Lim.*, 148, (Marg. 125;) Do, 141-2, (Marg. 119-20;) *Slinger v. Henneman*, 38 Wis., 509-10.

If these appellants were ever clothed with the powers claimed, the mode of their selection and appointment was unlawful: Organic Act, Sec., 1857. They belong to the class of officers whom " the Governor shall nominate, and by and with the advice and consent of the legislative council of each territory, * * appoint."

It is contended these commissioners are not "officers" within the meaning of this section. See Bacon's Abridgement, Officers: *United States v. Maurice*, 2 Brock, 128; *United States v. Hartwell*, 6 Wall., 385-93; *Vaughn v. English*, 8 Cal., 40-42; *Clark et al. v. Stanley et al*, 66 N. C., 59-63-4; *People v. Hays et al*, 7 How. Pr., 248; *People v. Comptroller*, 20 Wend., 595; *Wood's*

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Case, 2 Cow., 30; *United States v. Ferreira*, 13 How., 51; S. C. 19 Curtis, 380; *State ex rel. Att'y Gen. v. Kennon et al*, 7 Ohio St., 547; *Territory ex rel. Fiske*, 1 Mont., 252; *Duncan v. McAllister*, 1 Utah, 81; *People ex rel. Ryder v. Mizner*, 7 Cal., 519.

Both plaintiff and defendants moved for judgment in the court below, and defendants cannot now be heard to say the practice adopted by themselves in the lower court was improper. But this practice is proper and well settled. If the act was unconstitutional and void, then the issues, if any, raised by the answer, were immaterial: *Felsh v. Beaudry*, 40 Cal., 439; 3 Estee, (2d Ed.) 221, and cases cited. But this case belongs to that class of cases in which a jury cannot be demanded as a matter of right: Sec. 236, Code of Civil Procedure; High Ex. Leg. Rem., 443, (Sec. 613); *State v. Johnson*, 26 Ark., 281; *People v. Carpenter*, 24 N. Y., 86; *People v. Draper*, 15 N. Y., 532; *People v. N. P. R. Co.*, 42 N. Y., 217.

G. C. Moody, supplementary brief:

Since preparing my additional brief and argument, I have had an opportunity of examining some of the supposed precedents cited by appellants' counsel from the legislation of other territories.

The "inventive genius" which has enabled counsel to distort these legislative acts into examples or precedents for the legislation which is in question in this case, is far greater than any that could spring from the "boundless perrairers" of Dakota, or from any other spot on earth, save from the brain of one who thus, whether it be carelessly or wilfully, perils his professional reputation and abuses his high trust as a counselor of this court, by impressing upon it such pretended examples, in the vain endeavor to uphold a shameless swindle.

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These statements, of what are alleged to be examples and precedents, exhibit either a carelessness unworthy of the gravity of the question involved, a willingness to deceive the court to whom these citations are commended, or the most "child-like and bland" supposition that the poetic fervor displayed in the brief would so overwhelm court and counsel that they would be unable to discover the falsity of the statements regarding them.

We are gravely told, that "In at least five instances which have come to our notice, state and territorial capitals have been located in pursuance of a delegation of choice by the legislature to others," and counsel start off with Montana Territory:

"In Montana the seat of government was changed from Virginia City to Helena, by virtue of a vote of the people under authority of an act approved February 11, 1874. It is unnecessary to add that this was no less delegation of legislative authority, than if the choice were left to commissioners. *Barto v. Himrod*, is a gun which may be turned on the adversary for this point."

First—Let us see what are the facts about this:

On the 26th of May, 1864, Congress passed the Organic Act of Montana, which contained this provision:

"Section 12. *And be it further enacted*, That the legislative assembly of the territory of Montana, shall hold its first session at such time and place in said territory, as the Governor thereof shall appoint and direct; and at said first session, or as soon thereafter as they shall deem expedient, the Governor and legislative assembly shall proceed to locate and establish the seat of government for said territory, at such place as they may deem eligible: *Provided*, That the seat of government, fixed by the Governor and legislative assembly, shall not be at any time changed, except by an act of the said assembly, duly passed, and

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" which shall be approved, after due notice, at the first general election thereafter, by a majority of the legal votes cast on that question."

This section (12) was incorporated into the U. S. Revised Statutes and still remains as a part thereof.

The act of the Montana legislature submitting this question to a vote of the people, quoted by appellants' counsel, is exactly in accordance with the act of Congress, and is not only authorized but required by Congress. Congress required before any change in the seat of government should be made, not only the passage of an act to that effect, but also that such act should be submitted to a vote of the people for their approval. This was done just as Congress prescribed. Still we are admonished that "*Barto v. Himrod* is a gun which may be turned on the adversary for this point."

2. Let us take Colorado, the next cited. As we understand from the acts we have been able to obtain and examine in that instance, the seat of government was declared to be the town—the location of the building was left to a commission. Moreover, about nine months after the passage of the act quoted by counsel, it was repealed.

This Colorado case is of no moment as a precedent. After the seat of government is located by the Governor and legislative assembly, as the act of Congress provides, the site for a capitol building, the executive mansion, or other public building, may be obtained through subordinate agents, without violating either the letter or spirit of the enactment. This was all that was done in Colorado.

3. Next we will examine the foundation for the confident statement that Iowa furnishes us an " example of practical construction of the authority conferred on the territorial legislature," etc.

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I quote again from appellants' brief:

" IN IOWA: The first capital of the territory, Iowa City, was chosen by three commissioners, *named in the act*, and authorized to select a site for a permanent seat of government, and to lay out 640 acres into a town to be called Iowa City, with directions to sell lots and from the proceeds to build the capitol.

" The only limitation upon the discretion of the commissioners was, that the site should be chosen within the boundaries of Johnson county; the county then being larger than some states. The act, which was passed January 21, 1839, by the territorial legislature, gave substantially the same powers to commissioners therein named, which the act under debate gives this commission. Pursuant to that act, Iowa City was selected on the first of May, 1839, as the territorial capital, the town laid out and the capitol buildings constructed."

What are the facts in this instance? The legislature of Iowa did on the 21st of January, 1839, pass an act for the appointment of commissioners to locate the seat of government, but on the same day the legislature passed an act supplementary thereto, which provided that no further steps should be taken after the selection and report thereof to the Governor, until the consent of the United States should be obtained, and also authorized the Governor to apply to Congress for a donation of four sections of land *on which to locate the seat of government*. And also on the same day by resolution instructed the Delegate in Congress to ask for such donation of land on which to locate the seat of government, to be selected by the commissioners. Thus showing beyond controversy that nothing could be or was intended to be done until Congress had acted and consented to this mode of locating the seat of government.

The sections of this act and the joint resolution are as follows:

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“ Section 1. *Be it enacted, etc.*, That so soon as the place
 “ shall be selected, agreeably to the provisions of the act to which
 “ this is supplemental, and report thereof made to the Governor,
 “ *and the consent of the United States obtained*, the commis-
 “ sioners shall proceed to lay out a town, to be called “ Iowa City,”
 “ on the piece of ground so selected, upon such place as may be
 “ agreed upon by a majority of said commissioners, etc.”

Sec. 2. * * * * *

Sec. 3. * * * * *

“ Sec. 4. That the Governor is hereby authorized to apply to
 “ Congress for a donation of, or a pre-emption to four sections of
 “ land on which to locate the seat of government of the territory
 “ of Iowa, etc.”

“ *Be it resolved by the Council and House of Representatives*
 “ *of the Territory of Iowa*, That the Hon. William W. Chap-
 “ man, our Delegate in Congress, be instructed to ask a donation,
 “ of at least four sections of land, on which to locate the seat of
 “ government of the territory of Iowa, to be selected by the com-
 “ missioners appointed by the legislative assembly of Iowa, to
 “ locate the seat of government of said territory. Approved,
 “ January 21, 1839.”

After this action by the territorial legislature, in pursuance thereof, application seems to have been made to Congress, and on March 3, 1839, Congress passed the following act:

“ *Be it enacted, etc.*, That there be, and hereby is, appropriated
 “ and granted to the territory of Iowa, one entire section of land,
 “ of any of the surveyed public lands in said territory, for the
 “ purpose of erecting thereon the public buildings for the use of
 “ the executive and legislative departments of the government of
 “ the said territory: *Provided*, That the said section of land
 “ shall be selected *under the authority* of the territorial legisla-

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“ ture, the seat of government located thereon, and notice of said
“ selection officially returned to the register of the land office, in
“ the district in which the land is situated within one year from
“ the passing of this act: *And provided further*, That nothing
“ herein contained shall authorize the selection of the sixteenth
“ section in any township reserved for the use of schools, nor of
“ any lot reserved for public purposes; and that in the selection to
“ be made as aforesaid, no pre-existing improvement or right to
“ pre-emption recognized by law, shall be prejudiced thereby.

“ Sec. 2. *And be it further enacted*, That if, at the time of
“ the selection of the section of land to be made as aforesaid, the
“ contiguous sections thereto have not been made subject to public
“ sale, or being so subject have not been sold at public sale or by
“ private entry, then each and every section contiguous to said
“ selected section, and not so sold, shall be thereafter reserved and
“ withheld from sale in any manner, until the further order of
“ Congress thereon.

“ But nothing herein expressed shall be construed to restrain
“ the said territory of Iowa, after appropriating a sufficient quan-
“ tity of land within said selected section for the site and accom-
“ modation of the public buildings, from selling and disposing of
“ the residue of said section in lots or otherwise, for the use of
“ said territory, in the erection and completion of said buildings.
“ Approved, March 3, 1839.”

Thus it will be seen that instead of this being a precedent for the legislation now before us, it is directly the opposite. In Iowa neither the legislature nor the commissioners sought to do any act without express authority of Congress, and Congress by its act of March 3, 1839, expressly provides for the selection of the section on which the seat of government is to be located—not by, but *under the authority* of, the territorial legislature. Having these

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laws and these petitions before it, Congress expressly provided for precisely what was done by the legislature. Yet this court is told with all the gravity which ordinarily pertains to truth, "that this is in every respect a complete precedent for the act in question."

4. But appellants' counsel seem to have got the worst "mixed" in the case of *Illinois*. Again quoting from appellants' brief, they say:

"IN ILLINOIS: Long before its creation into a territory, "Kaskaskia," or "Kusky," as it was familiarly called, was by common consent of the earliest settlers, the headquarters of the country, and as such was recognized as the seat of government on the organization of the territory.

"By an act of the first territorial legislature, passed at its second session in 1818-19, commissioners were appointed by the legislature, *in the act*, to select a new site for the territorial capital, without limitation. These commissioners made choice of a place, then in the midst of the wilderness, subsequently named Vandalia, and there the capital remained for a long period, although it was afterwards changed to its present location."

Now the fact is that Illinois was organized as a separate territory, February 3, 1809, and by section 8, of the act, Kaskaskia was made the seat of government in these words:

"Sec. 8. *And be it further enacted*, That until it shall be otherwise ordered by the legislature of the said Illinois Territory, Kaskaskia, on the Mississippi river, shall be the seat of government for the said Illinois Territory. Approved, February 3, 1809."

Illinois was admitted into the Union, December 3, 1818; and it was the first *State* legislature—not the first *territorial* legislature—that passed the act which the counsel refer to.

Even that act was passed under these circumstances: Section 13, of the schedule to the constitution, contained these provisions,

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and it will be seen Kaskaskia still continued the seat of government:

“The seat of government for the State shall be at Kaskaskia until the general assembly shall otherwise provide. The general assembly, at their first session holden under the authority of this constitution, shall petition the Congress of the United States to grant to this State a quantity of land, to consist of not more than four, nor less than one section, or to give to this State the right of pre-emption in the purchase of the said quantity of land; the said land to be situate on the Kaskaskia river, and, as near as may be, east of the third principal meridian on said river. Should the prayer of said petition be granted, the general assembly, at their next session thereafter, shall provide for the appointment of five commissioners, to make the selection of the land so granted; and shall further provide for laying out a town upon the land so selected; which town, so laid out, shall be the seat of government of this State for twenty years. Should, however, the prayer of said petition not be granted, the general assembly shall have power to make such provisions for a permanent seat of government as may be necessary, and shall fix the same where they may think best.”

In pursuance of the petition thus provided for, Congress, on March 3, 1819, passed the following act granting the four sections for a seat of government for the State, and recognized the mode of selection in such schedule:

“*Be it enacted, etc.,* That there shall be granted to the State of Illinois four sections of land, or contiguous quarter sections and fractions, not exceeding the quantity contained in four entire sections, for the purpose of fixing thereon the seat of government for the said State; which lands shall be selected in the manner provided in the thirteenth section of the schedule to the consti-

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"tution of the said State: *Provided*, That such selection shall "be made before the public sale of the adjoining public lands "shall have taken place. Approved, March 3, 1819."

Thus it will be seen:

1st. It was not a territorial act at all appointing these commissioners, but the act of the State legislature.

2d. Instead of being a delegation of power, the act was simply obeying the mandate of the sovereign authority as embodied in the constitution.

These are the wonderful "well-known examples of practical construction of the authority conferred on the territorial legislature by these acts," and from them, "it is to be supposed that Congress intended by the Organic Act of Dakota to confer the same "powers on its legislature which had been exercised by the legislative assemblies of Iowa and Illinois, under similar acts without "dissent or question on the part of Congress or of any lawyer or "judge."

It is to be hoped that before such broad assertions are again made as are here so confidently made by the distinguished counsel for the appellants, that a little of "that inventive genius" which springs from the "boundless perrairers" may enable them to at least search for the truth; and if having searched and found it, to display it.

It would be commendable if the "desperate absurdity of the attack" was met by more careful research or more truthful citations. At least we of the "boundless perrairers" have been taught that before citing statutes as precedents, it is wise to examine them.

5. In the case of the State of Nebraska, the constitution contained no provision upon the subject of locating the seat of gov-

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ernment, and only provided that the first legislature should meet at the capitol at Omaha. There was, then, no prohibition and no restraint upon the legislature in this regard. We cannot see how it can be a precedent for this territory, when, as we have seen the PRINCIPAL, the source of all power, has in direct terms imposed this trust upon these two tribunals and upon them alone.

We are justified in presuming that in so important a case as this, counsel for the appellants have searched for and found all the instances of territorial or State legislation which they supposed were precedents for the legislation in question, and the foregoing are the results.

We submit that the very particularity displayed in each instance of congressional and territorial action, argues that Congress meant by this law just what it says: that the Governor and legislative assembly, and they alone, were authorized to and entrusted with the duty of changing the seat of government for the territory; and if any other mode of changing such seat of government was contemplated, Congress would have so expressly provided.

CHURCH, J.—This was an action in the nature of a proceeding of *quo warranto*, brought to prevent the defendants from exercising certain duties as commissioners for selecting a site for the permanent seat of government, and erecting the capitol building of the territory of Dakota, under appointment of an act of the legislature of the territory, approved March 8, 1883.

The complaint alleges the appointment by the then Governor of the territory, February 11, 1862, of the city of Yankton as the place for the first meeting of the legislative assembly; the meeting of the legislative assembly at the time and place so appointed; the location and establishment by said Governor and legislative assem-

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bly of the seat of government at Yankton by act approved April 8, 1862; that Yankton has ever since been the lawful seat of government; that all sessions of the legislative assembly have been held there; the territorial offices held thereat; and all the public books, records, and archives kept there; and that said seat of government has never since been changed by the Governor and legislative assembly, as provided by the Organic Act. The complaint then alleges the appointment of the defendants as commissioners for the purposes above mentioned "under and by virtue of a pretended act of the legislative assembly of the territory of Dakota, * * * approved March 8, 1883, which said appointments were and are in violation of said act organizing the territory of Dakota."

It further alleges that the defendants, as a pretended board, under said pretended act, have usurped said office of commissioners, and the right, privilege, and franchise of naming the seat of government, and are proceeding to change and permanently locate the capital and seat of government at some place other than the city of Yankton, in violation of law and the Organic Act. After some further allegations, not material to the present inquiry, judgment is demanded that defendants are not entitled to said office, and that they be ousted therefrom, and that the said pretended act, and all acts done or performed by said commissioners, be declared illegal and void.

The answer of the defendants, admitting the facts to be substantially as charged in the complaint, avers their due qualification as commissioners by giving bonds and taking the oath as prescribed in the act of 1883, and insists upon the validity of said act, and the regularity of all their proceedings thereunder.

It being considered by the court that no material issue of fact was raised, the cause was heard upon motions by both parties for judgment upon the pleadings. The motion of the plaintiffs pre-

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vailed, and on August 27, 1883, judgment was given "that said defendants and each of them be, and they are hereby forever ousted and excluded from said office of commissioners mentioned in said act in the complaint described, and from all franchises and privileges named, enumerated, or included therein." From that judgment this appeal is taken.

Passing by as not necessary to be considered, certain questions of practice raised by the appellants, the errors assigned are the refusal of defendants' motion for judgment, the granting of plaintiff's motion, and the judgment rendered thereupon.

The provisions of the act, quoted in full so far as necessary to the proper consideration of this case, are as follows:

"Section 1. The seat of government of the territory of Dakota is hereby removed from the city of Yankton, in the county of Yankton and territory of Dakota, and is located and established as hereinafter provided."

"Sec. 2. That Milo W. Scott, Burleigh F. Spaulding, Alexander McKenzie, Charles H. Myers, George A. Matthews, Alexander Hughes, Henry H. DeLong, John P. Belding, M. D. Thompson, be and they are hereby appointed commissioners for the purpose of locating the permanent seat of government and the capitol building of the territory of Dakota."

Section 3 provides for the qualification of the commissioners by giving bonds in the sum of \$40,000 each, and the taking of the customary oath, their organization by the election of president, secretary, and treasurer, and the giving of a bond by the latter in the sum of \$100,000.

"Sec. 4. On or before the first day of July, A. D. 1883, the commissioners, or a majority of them, shall select a suitable site for the seat of government of the territory of Dakota, due regard being had to its accessibility from all portions of the territory,

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“and its general fitness for a capital, when at least one hundred thousand dollars (\$100,000) shall be paid or guaranteed in money; if the amount be not paid in money, then its payment to the territory shall be secured by a bond, with good and sufficient sureties, payable to the territory, which bond shall be approved by said commissioners, or a majority thereof, and after the site is determined upon as aforesaid, said commissioners shall secure good and sufficient title deeds of at least one hundred and sixty acres of land, upon which the capitol buildings shall be erected, and a sufficient amount of said grounds shall be laid out into squares and suitable landscapes, and the same is hereby declared to be the permanent seat of government of the territory of Dakota, at which all of the public offices of the territory shall be kept, and at which all of the sessions of the legislature shall hereafter be held.”

Sections 5, 6, and 7, provide for the laying off into lots, blocks, streets, alleys, and public squares, and for sale and conveyance of the residue of the lands not occupied by the capitol buildings and improvements.

“Sec. 8. All moneys received by the commissioners for the sale of lots shall be forthwith deposited by them in the territorial treasury, and said money shall be held by the treasurer as a territorial building fund, and shall be kept by him separate from other funds and be separately accounted for.”

Section 9 provides for the expenses of the commissioners, and for their compensation at the rate of six dollars for each day actually employed, (such compensation not to exceed in the aggregate \$10,000,) all to be paid out of the territorial building fund. Sections 10, 11, and 12, provide for the erection of the necessary buildings; section 12 concluding as follows: “As soon as the capitol building, provided for in this act, is erected and completed,

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“ it shall be the duty of said commissioners to report such facts to
“ the Governor, who shall thereupon issue his proclamation setting
“ forth the action of the commissioners, and declaring said build-
“ ing ready for occupancy. And it shall then be the duty of all
“ the territorial officers, whose offices are properly kept at the cap-
“ itol, to remove, within thirty (30) days thereafter, their several
“ offices, together with the public property, archives, records, books,
“ and papers to the building and place so declared ready for occu-
“ pancy, and all sessions of the legislature shall thereafter be con-
“ vened in the said building at the said place.”

“ Sec. 13. The title to all lands secured by the commissioners
“ for the location and erection of capitol buildings shall be con-
“ veyed to the territory of Dakota.”

Section 14 requires the commissioners to make a full and complete report of all their doings to the next legislature, declares that they and their sureties shall be held responsible on their bonds for all their acts until the legislature shall order the bonds delivered up to them, and prohibits them from purchasing or acquiring any interest in any real estate, within 10 miles of the site selected, within one year from the passage of the act, and from being interested in any contract made under the provisions of the act.

Section 15 prescribes penalties for violation of the foregoing section.

“ Sec. 16. Until the territorial capitol buildings shall be ready
“ for occupancy as provided by this act, the territorial officers shall
“ temporarily keep their offices, archives, books, records, and
“ papers at the city of Yankton, unless the Governor shall desig-
“ nate some other place by written order, in which case the said
“ officers shall remove their respective offices, together with the
“ archives, books, records, and papers pertaining thereto, to the
“ place so designated within the time prescribed in such order.”

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“Sec. 17. Chapter 1, of the Political Code, and all acts or parts of acts in any manner in conflict with this act or repugnant thereto, are hereby repealed.”

“Sec. 18. This act shall take effect and be in force from and after its passage and approval.”

We are not informed by anything in the records, or by any written opinion of the learned Chief Justice before whom the case was tried, of the grounds upon which the judgment of the District Court was based; but the principal reasons urged in this court in support of that judgment are:

First.—That the act of 1883 is in conflict with those provisions of the Organic Act of the territory, under and in pursuance of which alone the power to change the seat of government can be exercised, in that it delegates to these defendants the duty of selecting a suitable site for the location of the seat of government,—a duty which, it is claimed, could be lawfully performed by the Governor and legislative assembly only.

Second.—That said act is also in conflict with the Organic Act, in that it appoints these defendants by name as commissioners, whereas, if any lawful appointment could be made for the purposes indicated, such appointment should have been made by the Governor, by and with the advice and consent of the legislative council, upon the Governor's nomination.

These are the questions, therefore, which are presented for our consideration,—questions whose just determination is to be sought in the line of established principles of legal interpretation and construction, guided only by the purpose to ascertain and declare the law.

The first inquiry which suggests itself is as to the nature and extent of the general powers conferred upon the territorial legis-

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lature by the Organic Act, since upon this foundation rests whatever claim to validity may be possessed by the act in question.

We shall not attempt to follow counsel in their interesting discussion of the various theories of ultimate sovereignty, and the sources and nature of the power of the Federal and State legislatures. We shall limit ourselves to as brief an expression of our views as may be consistent with an intelligent statement of the reasons which have led the court to its judgment.

We think it must be regarded as a settled principle of constitutional interpretation in this country, that the people are the sovereigns, and that in the people resides ultimate sovereignty.

If we consider the several State organizations, it is evident that the legislature is not the State, nor is the judiciary, nor the executive, nor are all combined, the State. The people organized into a political society are the State, and the various departments mentioned are but the machinery through which the popular will finds expression, interpretation, and execution. To these several departments the people have committed—or, in other words, delegated—the exercise of the various powers and duties appropriate to each, and as limitations thereupon have formulated and adopted those organic instruments which we call constitutions; and the power that thus created, conferred, and limited, may, within certain limitations, alter, amend, and even abrogate. And it is to be observed that these limitations last referred to are either self-imposed, or such as inhere in the very nature and constitution of human society; they are never imposed upon the people by any of the departments of the State government, nor can they be. The servant cannot control the master.

Nor does it militate against this view to suggest, as do respondents' counsel, that no body of the people, however numerous, even though comprising all the citizens of a State, would have any more

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right to violate a law than would any one citizen; since it is not in the people as a mere aggregation of individuals, but in the people as an organized political society, which is, in contemplation of law, a voluntary association, that the sovereignty resides; and the sovereign will having been expressed in its appointed way, one and all are equally bound to obey it; and, in the terse language of the accomplished author of the Letters of Junius, "the submission of a free people to the executive authority of government is no more than a compliance with laws which they themselves have enacted."

Passing now to the Federal government, we find here a like commission or delegation of power from the sovereign, to-wit: the people; only here it is the people of the United States who are sovereign. The language of the preamble to the constitution is: "We, the people of the United States." Here, too, we have the three departments of government framed for the expression, interpretation, and execution of the sovereign will, to each of which have been committed or delegated its appropriate powers. And here, also, we find an Organic Act or instrument, called a constitution, containing within itself an expression of the conditions and methods, self-imposed by the sovereign, under and in accordance with which it may be altered or amended. This is sometimes spoken of as a surrender of power by the people to the general government; but can it be so regarded? The only true view of our system of government, both State and National, is that which regards the people as still sovereign, and every lawful act of every department of any of these governments, State or National, as but the will of the sovereign, expressed by and through their chosen instruments.

It may, perhaps, be conceded that there is this difference between the State and the Federal constitutions: that while the former are

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to be regarded as limitations upon the general powers of the State government, the latter is to be searched for the grant of any power claimed on behalf of the National government: (Cooley, Const. Lim., 173;) although, in such a search, it should always be remembered that there is "a vast domain" of implied powers,—powers necessary for the effectuation of those specifically granted. By the ordination of that instrument the federal Union was formed; and in it, either expressly declared or necessarily implied, is to be found every power delegated by the people to the *general* government. We should hardly have thought it necessary to cite any proof of the proposition that the powers possessed by the several departments of the federal government are, in a broad and general sense, delegated powers, had not counsel for the respondents so earnestly insisted upon a contrary view.

The preamble to the constitution recites the sovereign purpose. The first section of article 1 declares that "all legislative powers herein *granted* shall be vested in a Congress of the United States." The eighth section of the same article prescribes what this Congress shall have power to do. And article X of the amendments declares that "the powers *not delegated* to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Among the powers conferred upon the general government in its various departments are those of declaring war and making treaties. Implied in these powers is that of acquiring territory by conquest or purchase; and a necessary consequence of such implied power would seem to be the power to dispose of and make all needful rules and regulations respecting the territory so acquired. This latter power, however, has been expressly conferred upon the Congress by section 3, of article IV, of the constitution. From whatever source derived, the possession by Congress of the

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power of governing the territory of the United States is unquestioned, (*Amer. Ins. Co. v. Canter*, 1 Pet., 542;) and this power is complete and absolute. "Congress is supreme, and, for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the constitution. * * * It has full and complete legislative authority over the people of territories and all the departments of the territorial governments." *Nat. Bank v. Yankton Co.*, 101 U. S., 132.

It is manifest, also, from the considerations already advanced, that this power, like all others possessed by Congress, is a *delegated one*. In the language of the opinion just cited, "Congress * * * has all the powers of the people of the United States" in the matter. If, therefore, the maxim, *delegatus non potest delegare*, invoked by respondent's counsel, be applicable, it may appear somewhat strange that, instead of any question as to the power of Congress to legislate for the territories, there has never been raised the question whether such delegated power could be redelegated; in other words, whether it could be lawfully exercised in any other way than by the enactment by Congress of a system of laws complete in all details of government for the territories. For, beginning with the ordinance of 1787, the practice of Congress has been to establish in all the territories complete systems of local self-government similar in all essential respects to those of the States of the Union, and to commit to the various departments of these local governments the exercise of all the functions appropriate to each, reserving either expressly, as in some instances, or impliedly, as in others, a supervisory and revisory power over all territorial legislation.

It would be a vain task for this court or any other court to

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assail this long-established policy, on the ground that it is an unlawful delegation of delegated power. Rather should we seek for some solution of the question which shall be in harmony with those broad principles upon which rests the fabric of the republic. Such a solution, we believe, may be found embraced in or closely associated with the great underlying principle of local self-government. It was never the intention of the framers of our federal Union that any portion of the public domain should *forever* continue to be "but political subdivisions of the outlying dominion of the United States," bearing a relation to the general government "much the same as that which counties bear to the respective States." Nor do we think that the above language, quoted from the opinion of the Supreme Court of the United States in the case of *National Bank v. Yankton Co.*, before cited, is to be extended beyond its original purpose.

The principal questions under consideration in that case were as to the power of Congress to legislate specifically for the territories, and the effect to be given to such legislation, and to those questions the language quoted was apt and pertinent. But it is unnecessary to presume that that language was intended by the court as an accurate judicial definition of the political *status* of the territories applicable to all cases. Such a proposition would not command the assent of any diligent student of constitutional law, and we think no such construction can be placed upon that opinion.

The controlling basilar idea of our republic is that of an organic union of republican States; a noble building "fitly joined together, and compacted with that which every joint supplieth." The ultimate purpose is that every portion of its territory shall, as soon as practicable, be organized into States which shall take their equal place and part in the Union. The territorial condition is but a necessary incident of immaturity. Every essential element of

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statehood is there, and the policy of the government has always been to employ this period as one of preparation by clothing the territories with the paraphernalia and investing them with many of the duties and privileges of statehood.

Let us see what has been done in this respect. The ordinance of 1787 for the government of the northwestern territory has been already alluded to, and although that was enacted prior to the adoption of the constitution and is not now in force, (*Strader v. Graham*, 10 How., 82,) the general policy of Congress in reference to the government of the territories has remained as therein expressed. We do not wish to be understood as affirming any right in the inhabitants of any particular portion of the public domain to demand admission into the Union as a State. The hand that created can destroy, and the boundaries of any territory may be entirely altered by Congress at its pleasure. We are merely stating what we understand to have been the general policy of the government.

The acts under which the several territories have been from time to time organized, are all drawn after the same general pattern, and are in all essential particulars similar. That organizing this territory was passed March 2, 1861: 12 Statutes at Large, 239. Its title is: "An act to provide a temporary government for the territory of Dakota, and to create the office of surveyor general therein." The first declaration of the act is, that the territory therein described "is hereby organized into a temporary government by the name of the territory of Dakota." Section 2 vests the executive power in a governor, and prescribes in very general terms his powers and duties, among which we note here, for future reference, that "he shall approve all laws passed by the legislative assembly before they shall take effect." Section 4 vests "the legislative power and authority of said territory in

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the Governor and legislative assembly," and provides for the election and constitution of the latter. Section 6 declares that "the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution and the provisions of this act;" but prohibits any legislation interfering with the primary disposal of the soil, taxing property of the United States, taxing property of non-residents higher than that of residents, impairing private property, or making any discrimination in taxing different kinds of property. Section 9 vests the judicial power of the territory in certain courts therein mentioned, and prescribes in general terms their jurisdiction. Section 13 provides for the election of a delegate to the House of Representatives of the United States. Other sections provide for the appointment of various officers, and sundry other matters not necessary to be mentioned in this connection.

Here, it will be observed, is no code of laws, civil or penal. This Organic Act is, in all its essential generic features, similar to the constitutions of the several States, and there can be no doubt that it was designed to serve a similar purpose, (*Ferris v. Higley*, 20 Wall., 375, 380;) the power to amend, alter, or repeal, however, remaining in Congress, which may exercise such power in a summary way, either directly or indirectly, by adverse legislation.

If the provisions of the Organic Act pertaining to legislation are to be regarded as a mere delegation to the territorial legislature of the law-making power, ample and complete as it is, and extending as it does, in general terms, to all rightful subjects of legislation, they might seem obnoxious to the well-settled rule that powers strictly and exclusively legislative cannot be delegated: *Cooley*, Const. Lim., 116; *Wayman v. Southard*, 10 Wheat., 1. But such a view of the Organic Act is manifestly a too narrow one. The same author just quoted, referring to the rule that legislatures cannot delegate the power to make laws, says, (5th Ed. p.

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228:) "But fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims, * * * that the right to create towns and counties, * * * and to confer upon them the powers of local government, * * * would always pass unchallenged. The legislature, in these cases, is not regarded as delegating its authority, because the regulation of such local affairs is not understood to belong properly to the State." And yet it must be admitted that the State may regulate them by direct legislation.

We have quoted these words of this learned author merely for the purpose of showing that not every creation by the legislature of subordinate legislative bodies is to be regarded as a delegation of law-making power, although, for reasons already stated, we think that the analogy between the relations borne by counties and other municipal organizations to the State legislatures and those borne by the territory to the Congress of the United States is by no means complete. There is a wide and, as it seems to us, an essential difference in the conditions and purposes of their existence. The relations between the territories and the general government may indeed be said to be *sui generis*, having no complete analogy in any other political organizations.

So, then, we must either boldly affirm that the whole scheme of territorial government is unlawful, and that the established policy of Congress in this regard is an abdication of the trust committed to it by the people; or, taking a broader and more comprehensive view, we shall conclude that the power reposed in Congress to make needful rules and regulations for the government of the territories comes fairly within the scope of those administrative functions of legislative bodies which it is generally conceded they may either exercise themselves in detail or by statutes containing general provisions only, and that in erecting within the prospective

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State the full machinery of a State government, with all its departments, Congress has discharged to that extent the trust reposed in it in a mode which was not only demanded by the exigencies of the situation, but which is also in entire harmony with our republican system of government.

And since the investiture of the territorial legislature with legislative powers is, as we have seen, general in its terms, extending to all rightful subjects of legislation, we think this is to be regarded as a delegation of authority in the same general sense only in which the powers of Congress are considered to be delegated to it by the people, and that such powers are, within their proper scope, to be exercised in the same manner as like powers may be exercised by other legislative bodies, state and national.

Sanction for the views thus expressed will be found in several decisions of the Supreme Court of the United States. In the case of *Miners' Bank v. Iowa*, 12 How., 1, the court says: "By what may be termed the Organic laws, creating the governments of both the territories above mentioned, it will be seen that those governments were vested with general legislative power, and were subjected to no enumerated or specific limitations of that general power, save in certain exceptions relating to the lands or other property of the United States," etc.

Language of like import was employed by the court in the case of *Trustees of Vincennes University v. Indiana*, 14 How., 273.

Again, in the case of *Clinton v. Englebrecht*, 13 Wall., 434, the court says, (p. 441:) "The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress." And after referring

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to the Ordinance of 1784, and the fact that this was superseded by that of 1787, already referred to, the court further say: "This legislature (provided for by the Ordinance) * * * was clothed with the full power of legislation for the territory:" Page 442. And again, on page 443: "In all the territories full power was given to the legislatures over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all."

So, also, in the case of *Hornbuckle v. Toombs*, 18 Wall., 648, the court says, (p. 655:) "As a general thing, subject to the general scheme of local government chalked out by the Organic Act and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law; subject also, however, to the right of Congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislature are nearly as extensive as those exercised by any State legislature." See, also, *Ferris v. Higley*, *supra*. We might add that in the District of Columbia, over which, by the express terms of the constitution, (article 1, Sec. 8,) the power to exercise exclusive "legislation in all cases whatever" is given to Congress, Congress at one time provided a Governor and legislature, and a complete system of government: Revised Statutes relating to District of Columbia, pages 1 to 149.

Having thus defined the relation of the territory to the general government, and the general powers of the territorial legislature under the Organic act, the next inquiry which presents itself is, what provision is made in the Organic Act for a change of the location of the seat of government of the territory? Section 12 of that act, is as follows: "That the legislative assembly of the territory of Dakota shall hold its first session at such time and place

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“ in said territory as the Governor thereof shall appoint and direct,
“ and at said first session, or as soon thereafter as they shall deem
“ expedient, the Governor and legislative assembly shall proceed
“ to locate and establish the seat of government for said territory
“ at such place as they may deem eligible; which place, however,
“ shall thereafter be subject to be changed by the said Governor
“ and legislative assembly.”

It is contended by counsel for respondents that in this section alone is to be found the power to change the location of the seat of government, and that such power is a special trust conferred upon and reposed in the Governor and legislative assembly, by which they are charged with the duty of personal selection of a new location. In support of this view it is insisted by counsel for respondents that the words, “ as they may deem eligible,” contained in the section just quoted, not only impose upon the Governor and legislative assembly the personal duty of determining the eligibility of the place at which the seat of government was to be first located, but that these words are to be transferred, and relate with like force to the last clause of the section, which contemplates a subsequent change or changes.

It would be a sufficient answer to this contention to say that the section referred to was long since superseded by section 1944 of the Revised Statutes, in which these words are not found; but, inasmuch as what we regard as the only provision of the original section pertinent to the circumstances is preserved in the present act, it will be convenient to take a general view of both.

In the first place, let us see to what a result such a construction as that contended for would lead us. This territory is, in round numbers, some 400 miles square, with a population said to be nearly 350,000, distributed over a great portion of its surface. A number of important and growing towns were contending for the

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honor and profit attaching to the seat of government—each, no doubt, deeming itself to possess peculiar advantages. By the organic law the legislature meets biennially, and its sessions are limited to 60 days. The facilities for ready transportation in the territory are limited. Manifestly, it would be impossible for a legislative assembly convened from so large a territory for so short a period, and in the midst of many other pressing duties, to make intelligent choice of a location for the seat of government. But it is suggested that a committee of the legislature might be appointed to examine and report. To examine, when? During the 60 days' session, or so much as might remain after their appointment? Meantime, during their absence upon this duty, what is to be done with general legislation? How are the constituencies of these committee men to be represented in the legislature? Or, if their examination is to be made after the adjournment of the legislature, to whom are they to make their report? To the next legislature? That would not be the body that appointed them; they would probably not be members of the new body, and, if they should, it would be by virtue of a new election; and, even if the report of such a committee to such new legislature could have any possible value, or be received and adopted by legislative act, at least four years would intervene between the initiation of steps to change the seat of government and the time when a new location could be made available for a session of the legislature. But we do not think the act will bear any such construction. Certainly none such is necessary. The argument of the learned counsel strikes us as more ingenious than forcible. We have already noticed that it was not wholly pertinent.

In order to ascertain the powers and duties of the legislature in this respect we must look, not alone to any isolated section of the Organic Act, but to every part of it, considering its whole scope and purpose. We have already seen that the purpose of that act,

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as declared in its title, is not to govern, but "to provide" a temporary government for the territory. We have also seen that the legislative power in the territory is vested in the "Governor and a legislative assembly," and that such legislative power is a general one, extending to all rightful subjects of legislation. We have heretofore noted the fact that, by the second section of the original act, it was provided that the Governor should approve all laws passed by the legislative assembly before they should take effect, thus requiring the absolute concurrence of the Governor, and constituting the executive a part of the legislature, or law-making department of the government.

An examination of the Revised Statutes of the United States will show that this provision is now repealed. This was effected by an act passed March 2, 1863, relating primarily to the territory of Colorado, but made applicable, in part, to this territory: 12 Stats. at Large, 700. This last-mentioned act gave the Governor the usual veto power, but provided for the passage of bills by the assembly over the veto, thus recognizing the usual distinction between the legislative and executive departments, and assimilating the system of legislation to that of the states and of the United States: Rev. Stats., Sec. 1842.

It will be noticed, however, that the original provision of the Organic Act, by which the legislative power is vested in the Governor and a legislative assembly, is still retained in the Revised Statutes, (section 1846,) whence we must conclude that these two sections are not repugnant, but are to be read together, if possible, which, it is manifest, may be readily done.

Let us now examine the provisions of section 12 of the Organic Act, already quoted. Obviously it was necessary that some provision should be made for the first meeting of the legislature. Hence we find that the Governor was authorized to designate the

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place for holding such first session, but the legislature—that is, the Governor and legislative assembly—were directed “to proceed thereafter to locate and establish the seat of government * * * at such place as they may deem eligible;” in other words, wherever they may choose to locate and establish it. And it may not be out of place here to call attention to the same omission on the part of Congress to restrict the choice of location in terms to the territory of Dakota, that counsel for respondent have noted with some severity of criticism, in the territorial statute of 1883.

Realizing, however, that in such a vast territory the center of population and commerce would, in all probability, shift from its original location, and thus render a further change or changes desirable, and with the purpose, no doubt, of avoiding any question which might arise as to the power of the legislature to make such change, the further clause is added: “Which place, however, shall thereafter be subject to be changed by the said Governor and legislative assembly.” This seems to us to be the full scope and purpose of the section referred to. We do not regard it as either an enlargement or limitation of the general legislative powers already conferred, but as a declaratory provision inserted by way of precaution; and, whether considered as pertaining to the strictly law-making functions of the legislature or to those administrative functions belonging to every legislature, this power could, at least, be properly exercised in the form of a legislative act, as such functions are usually exercised by legislative bodies.

In accordance with this view was the action of the territorial legislature, which, by enactment in the usual form, passed by the legislative assembly, and approved by the then Governor, April 8, 1862, located and established the seat of government at Yankton. Strangely enough, however, all the counsel who have presented printed briefs in this case seem to have overlooked the fact that

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this is not the provision of law now in force applicable to this territory. Some of them have cited the section of the original act above quoted, while others have cited section 1885 of the Revised Statutes, which is substantially the same. But section 1885 in terms applies only to territories thereafter to be organized, while section 12 of the original act is superseded and repealed by the enactment of section 1944 of the Revised Statutes, which reads as follows: "The seat of government of the territories of [naming seven, Dakota among them,] may be changed by the governors and legislative assemblies thereof, respectively." And this is the provision now in force in this territory.

For the reasons already stated, however, we do not think any substantial change in the law was effected by this enactment; it merely re-enacted so much of the former act as was then applicable to the territories named. What we have said, therefore, in considering the former act, is in the main applicable to the present one.

With this general review of the powers of the legislature in respect of the subject-matter of this controversy, we are now prepared to consider the act in question, and to ascertain whether such of its provisions as are assailed in this proceeding are in conflict with any of the principles by which legislative bodies possessing general powers of legislation are governed in similar cases; for to this point, as we think, is the discussion brought by the views already expressed. Over 20 years have elapsed since the passage of the first act locating the seat of government, during which vast tides of immigration have been flowing in upon these broad and fertile plains. Yankton, once the practical center of population, has become, to by far the greater part of this new population, remote and inconvenient of access, and at its last session the legislature, deeming the time to have arrived when it was

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expedient to remove the seat of government to some place better adapted to the convenience and growing needs of the community, passed the act entitled "An act to provide for the location of the seat of government of the territory of Dakota, and for the erection of public buildings thereat," which act was duly approved by the Governor, March 8, 1883. Sections 2 and 4 comprise the provisions directly assailed by this action.

Upon the argument before this court a considerable portion of the discussion was devoted to the inquiry whether the exercise of the power of changing and relocating the seat of government pertains to the administrative or to the purely law-making functions of the legislature. Possibly it may involve both. Prescribing by law that a change shall be made and a new location selected, and the mode in which this shall be accomplished, would seem to pertain closely to the law-making function. But, whether so or not, the actual selection of a suitable location, and the erection of buildings and improvements thereon, are clearly, as we think, acts of an administrative character. Undoubtedly there may be combined in one section, as has sometimes been done, a declaration of the legislative will that a change be made, and a selection and designation by the legislature of a new location. Or, as has also frequently been done, the former may be expressed in one portion of the act, while in other portions thereof provision is made for the latter.

We are of the opinion that, if not wholly administrative, so much at least of the act in question as relates to the selection of a new site, and the erection of suitable buildings and improvements thereon, is clearly of an administrative character. The legislative will that the seat of government be removed, that it be located and established as in the act provided, and that the site selected and determined upon by the commissioners, in pursuance of the provisions of the act, shall be the permanent seat of government of the

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territory, is definitely expressed in the act itself. The undoubtedly important and responsible duties of selection and preparation for occupancy were delegated to these commissioners. The convenience of such delegation, the obvious difficulties in the way of a direct selection by the legislature, have been already alluded to. What legal principle is contravened by the delegation of this power? The legislature made the law. Every act done under it by these commissioners is done in pursuance and by authority of the law, and derives its sole vitality therefrom, and when done is to be regarded as the act of the legislature itself.

Legislative precedents in such cases are of great value. As remarked by Justice Caton in the case of *The People v. Reynolds*, 5 Gilman, 1: "In determining what is legitimate and proper legislation we feel warranted in looking at the past to see what kind of laws legislative bodies have been in the habit of passing." And an examination of such precedents will show that the provisions in question are in harmony with the long-established and well-nigh universal practice of legislative bodies, federal, state, and territorial.

Only alluding in passing to the unchallenged legislative practice of this territory, in common with many other states and territories, of delegating to commissioners and others the power to locate county seats, and do many other administrative acts which the legislature might undoubtedly do itself, we shall cite but a few of the more important of the legislative precedents just referred to. The territory of Iowa furnishes one of these. In its essential features the Organic Act of that territory was the same as that of Dakota. I very much regret that the statutes of the territory of Iowa are not accessible by me at this time. Though cited at some length upon the supplemental brief of counsel for respondents, some facts which I deem of importance are omitted. Briefly

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stated, however, it appears that in January, 1839, the territory of Iowa passed an act providing for the location of the seat of government through the agency of three commissioners who were appointed to select a site, lay out the grounds, sell lots, and from the proceeds erect suitable buildings. My recollection is that these commissioners were appointed by joint resolution, and that they were required to report their proceedings to the Governor; but I cannot affirm this with certainty. The territorial capital was selected and located pursuant to the provisions of the act.

Counsel for the respondents, however, claim that because, by the terms of a supplemental act passed at the same session, no further steps were to be taken after the selection and report thereof to the Governor until the consent of the United States should be obtained, and a donation of the land made by them, this precedent is to be regarded as opposed to, rather than one in favor of the legislation in question. But upon examination of the supplemental act it will appear that the consent which was to be obtained was not to the method adopted for making the selection, but to the appropriation of the land selected for the purpose designated, and that such consent was to be obtained, if possible, in the form of a grant or donation of the land. And such seems to have been the view taken of it by Congress, for we find that by an act passed March 3, 1839, Congress "appropriated and granted to the territory of Iowa one entire section of land, of any of the surveyed public lands in said territory, for the purpose of erecting thereon the public buildings for the use of the executive and legislative departments of the government of said territory: *Provided*, That the said section of land shall be selected *under the authority* of the territorial legislature, the seat of government located thereon, and notice of said selection officially returned to the register of the land office in the district in which the land is situated, within one year from the passing of this act."

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It is especially noticeable that the selection was directed to be made, not "by the Governor and legislative assembly," but "under the authority of the territorial legislature." No other authority for the selection of a site appears to have been given by the territorial legislature than that already referred to. It must be presumed that these acts were before Congress at the time of the passage of the donation act, and this legislation must, therefore, be considered to have received the sanction of that body, and to furnish an important precedent for the legislation in question.

In the case of *Clinton v. Englebrecht, supra*, in which the validity of the jury laws of the Territory of Utah was in question, the court say: "The uniformity of construction by so many territorial legislatures of the Organic Act in relation to their legislative authority, especially when taken in connection with the fact that none of these jury laws have been disapproved by Congress, though any of them would be annulled by such disapproval, confirms the opinion, warranted by the plain language of the Organic Act itself, that the whole subject-matter of jurors in the territories is committed to territorial legislation." And again: "In the first place, we observe that the law has received the implied sanction of Congress. * * * The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

In the Iowa case the attention of Congress must have been specially directed to the territorial law.

Another precedent is furnished by the state of Illinois, the site for whose capital was selected by commissioners, appointed in and by an act of the legislature of that state, passed in 1819. The value of this precedent, also, is assailed by counsel for the respondent, on the ground that the Constitution of the state con-

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tained an express provision for the selection of the site in this mode. The fact is as stated. The Constitution of Illinois, after directing the general assembly to petition Congress for a grant of land, did further direct that if such petition should be granted, the general assembly, at their next session thereafter, should provide for the appointment of five commissioners to make the selection of the land so granted.

But it is the propriety of this kind of legislation which we are now considering, as evidenced by the practice of other legislative bodies, and this provision of the Illinois constitution may, we think, be fairly regarded as an expression of the opinion of the people of that state that the mode of selection therein prescribed was the most suitable and proper one. In Nebraska, also, the present capital of the state was located by a commission composed of the Governor, Secretary of State, and Auditor, named in and appointed for the purpose by an act of the legislature of 1866-67, which removed the capital from Omaha, and located it at a point to be thereafter selected. So, also, was the seat of our Federal government selected and located.

The general power of Congress for this purpose is found in section 8, of Article I, of the Constitution, where the right of exclusive legislation is given "over such district (not exceeding ten miles square) as may, by cession of particular states and the *acceptance of Congress*, become the seat of government of the United States." By chapter 28, 1 Statute at Large, 130, it was enacted "that a district of territory not exceeding ten miles square, *to be located as hereinafter directed*, on the river Potomac, at some "place between the mouths of the eastern branch and Con-nogochegue, be and the same *is hereby accepted* for the permanent seat of government of the United States."

By the second section the *President* was authorized to appoint

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three commissioners, who, under his direction, "should survey, define, and limit a district of territory within the limits named," "and the district so defined, limited and located *shall be deemed the district accepted by this act* for the permanent seat of government of the United States."

It may be worthy of note in this connection, as pertinent to some adverse criticism upon the provisions of sections 1 and 16, of the territorial act, although we do not deem it essential to a determination of this controversy, that the act of Congress makes a somewhat similar provision.

The seat of government at that time was the city of New York. Section 5, of the act of Congress, provides "that, prior to the first Monday in December next, (1790,) all offices attached to the seat of government of the United States shall be removed to, and until the said first Monday in December, in the year one thousand eight hundred, [the date fixed for the completion of suitable accommodation at the new seat of government,] shall remain at, the city of Philadelphia, in the state of Pennsylvania, at which place the session of Congress next ensuing the present shall be held." Section 6 then provides that on the first Monday in December, 1800, the seat of the government, and all offices attached thereto, shall be transferred to the district and place selected for the permanent site thereof.

Nowhere in the act is Philadelphia designated, in *terms*, as a temporary seat of government, although such a purpose may be inferred from the title of the act, which is "An act for establishing the temporary and permanent seat of government of the United States."

We do not propose, however, to consider this particular matter further.

Numerous other discretionary powers, which are by the Consti-

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tution expressly vested in Congress, have been from time to time delegated by that body to the President and other executive officers; as, for instance, "to raise and support armies," (1 Stats. at Large, 223, 243, 558;) "to grant letters of marque and reprisal," (2 Stats. at Large, 755;) "to borrow money on the credit of the United States," (1 Stats. at Large, 187, and elsewhere;) "to make rules for the government and regulation of the land and naval forces," (1 Stats. at Large, 569; 2 Stats. at Large, 819;) during the rebellion, "to suspend the writ of *habeas corpus* whenever, in his judgment, the public safety may require it," (12 Stats. at Large, 755.)

With this brief view of some of the legislative precedents, we proceed now to consider some of the cases in which judicial sanction has been given to legislation of the same character as that in controversy. It is a difficult task to select, from the great mass of concurrent decisions upon this point, a limited number of those most pertinent to the circumstances, but we shall cite a few which we deem appropriate and decisive.

The case of *Upham v. Supervisors of Sutter Co.*, 8 Cal., 379, was one in which the validity of an act providing for the removal of a county seat upon a vote of the citizens was in question. The court say: "Providing for a place does not necessarily include "its direct selection. If the mode of selection is prescribed by "law, then the place is provided for. By the Constitution the "legislature is required to provide for many objects which cannot "be effected by the direct action of the legislature; and while the "maxim *delegatus non potest delegare* is, undoubtedly, true, "the extent of its application to legislative bodies must depend "upon the nature and design of the legislation, and the means "necessary to accomplish the design. * * *" In *Hobart v. Butte Co.*, 17 Cal., 24, a case involving the validity of bonds issued under a statute which submitted the question of issuance to

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a popular vote, the court say: "Every attribute of a law is impressed upon the act of 1860. The legislative will is complete in itself and in its expression. It is by force of the law that the bonds are authorized and issued. It is true that the issuance depends upon the will of the electors, but this condition is affixed by law, and is as much an emanation of the sovereign authority as is the grant of power." Elsewhere in the same opinion it is said: "Laws are passed every day which depend for validity upon the acts of individuals; *for example, such acts as the removal of capitals, court-houses, etc., upon donations or other advantages being secured.*"

The case of *People v. Reynolds*, 5 Gilman, (Ill.) 1, already cited, is very instructive. The court there say: "If we take the action of all past legislators in determining what may and should properly be done in the exercise of legislative powers, we see that while they are bound to make the laws, yet those laws need not be absolute, nor make every provision for doing that which they may authorize to be done; while all must be done under their sanction, yet they need not do all, nor command all,—a law may depend upon a future event or contingency for its taking effect, and that contingency may arise from the voluntary act of others. * * * If we say that this is an unauthorized delegation of legislative power, we forget what is a legitimate and proper exercise of that power. If the saying be true that the legislature cannot delegate its powers, it is only so in its most general sense. We may well admit that the legislature cannot delegate its general legislative authority, still it may authorize many things to be done by others which it might properly do itself. All power possessed by the legislature is delegated to it by the people, and yet few will be found to insist that whatever the legislature may do it shall do, or else it shall

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“ go undone. To establish such a principle in a large state would
 “ be almost to destroy the government. * * * We see, then,
 “ that while the legislature may not divest itself of its proper
 “ functions, or delegate its general legislative authority, it may
 “ still authorize others to do those things which it might properly,
 “ yet cannot understandingly or advantageously, do itself. * * *
 “ The object to be accomplished may be specified, and the rest
 “ left to the agency of others, with better opportunities of accom-
 “ plishing the object or doing the thing understandingly.”

In *Locke's Appeal*, 72 Pa. St., 491, Justice Agnew, speaking for the Supreme Court, says: “ What is more common than to
 “ appoint commissioners under a law to determine things, upon
 “ the decision of which the act is to operate in one way or another?
 “ * * * Then the true distinction, I conceive, is this:—the leg-
 “ isature cannot delegate its power to make a law, but it can make
 “ a law to delegate a power to determine some fact or state of
 “ things upon which the law makes or intends to make its own
 “ action depend. To deny this would be to stop the wheels of
 “ government. There are many things upon which wise and use-
 “ ful legislation must depend which cannot be known to the law-
 “ making power, and must therefore be the subject of inquiry and
 “ determination outside the halls of legislation.”

By section 9, of Article I, of the Constitution of the United States it is declared that “ the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.”

The Supreme Court of Wisconsin, (*In re Kemp*, 16 Wis., 382,) decided that the power to suspend this writ was a legislative power, and was vested in Congress; and that the proclamation of the President suspending the writ was for that reason void. Congress subsequently passed an act (already cited) conferring this power

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upon the President, and the same court, (*In re Oliver*, 17 Wis., 681,) sustained the validity of that act.

It is useless to multiply precedents. We cite for reference, without quoting, *Burr v. Blanding*, 13 Cal., 357; *Moers v. City of Reading*, 21 Pa. St., 202; *C. & W. & Z. R. Co. v. Com'rs*, 1 Ohio St., 88; *Wayman v. Southard*, 10 Wheat., 1; *Slack v. M. & L. R. Co.*, 13 B. Mon., (Ky.) 1; *State v. Parker*, 26 Vt., 357.

Our conclusion is, that the provisions of this act for the selection by commissioners of a suitable location for the seat of government, and for the erection thereon of the necessary buildings and improvements, are a lawful and proper exercise of legislative authority, and that the act in question is, in these respects, valid and operative.

The remaining question is, as to whether the designation of the commissioners by name in the act itself was lawful, being contended by the respondent that such designation is in conflict with section 1857, of the Revised Statutes of the United States, which requires that the Governor shall nominate, and, by and with the advice and consent of the legislative council, appoint, all officers, except certain ones otherwise provided for. This question we shall consider very briefly.

The officers contemplated by that section are, in our opinion, those continuously employed in the regular and permanent administration of government; those by whom the territory performs its usual political functions—its functions of government: *Sheboygan Co. v. Parker*, 3 Wall., 39.

The duties to be performed by these commissioners are of the most temporary character. Their functions wholly cease with the completion of those duties; and we do not think they can be regarded as officers, within the meaning of the section of the Organic Act referred to. Legislative and judicial proceedings for this view

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might readily be multiplied, but we deem it unnecessary to do more than cite a few, for reference, in addition to the one above mentioned: *Shepherd v. Com.*, 1 Serg. & R., 1; *Com. v. Sutherland*, 3 Serg. & R., 145; *State v. Kennon*, 7 Ohio St., 546; *Branham v. Lange*, 16 Ind., 497; *People v. Nichol*, 52 N. Y., 478; *In re Attorneys' Oaths*, 20 Johns., 493; *U. S. v. Hatch*, 1 Pinn., (Wis. Terr.) 182; *People v. Middleton*, 28 Cal., 604. In this respect, also, we must uphold the validity of the act in question.

The importance which has been given to this case by the acrimonious contest over the removal and relocation of the capital, and the general interest with which the decision of this court was awaited, have suggested the belief that such a presentation of the legal principles upon which our judgment is based as would render them measurably clear to the popular comprehension, would perhaps be anticipated, and indeed it were well if our citizens generally were better acquainted with the sources and extent of their political powers. These considerations have led to a somewhat more extended exposition of our views, and to a fuller quotation from the precedents cited, than we should otherwise have deemed necessary, since we regard the questions presented, when viewed in their true aspect, as free from any considerable legal difficulties, and have no hesitation in declaring that in our opinion the appellants are lawfully entitled to exercise the duties of their appointment under the act in question.

The judgment of the District Court must therefore be reversed, and judgment given by that court for appellants upon the pleadings. Ordered accordingly.

EDGERTON, C. J., *dissenting*.—I am unable to agree with the majority of the court in the conclusion to which they have arrived

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on this appeal. The possible far-reaching results involved require that I shall give the reasons for my dissent. The case is thus: March 2, 1861, Congress passed an act organizing Dakota Territory, which contained the following provisions:

“Sec. 6. *And be it further enacted*, That the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of the act;” * * *

“Sec. 12. *And be it further enacted*, That the legislative assembly of the Territory of Dakota shall hold its first session at such time and place in said territory as the Governor thereof shall appoint and direct; and at said first session, or as soon thereafter as they shall deem expedient, the Governor and legislative assembly shall proceed to locate and establish the seat of government for said territory at such place as they may deem eligible, which place, however, shall thereafter be subject to be changed by the said Governor and legislative assembly.”

These provisions remain in force to this day without any material change. In the Revised Statutes passed June 22, 1874, section 12 was substantially re-enacted, except that portion which had been completely executed, and now reads as follows:

“Sec. 1944. The seat of government of the territories of New Mexico, Utah, Washington, Colorado, Dakota, Arizona, and Wyoming may be changed by the governors and legislative assemblies thereof, respectively.”

In pursuance of the authority thus conferred by section 12 of the Organic Act, the first Governor of the territory appointed as the place for holding the first session of the legislative assembly what is now known as the city of Yankton. The first legislative assembly, by an act approved by the Governor, April 8, 1862, located and established the seat of government on section 18, in town-

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ship 93 N., range 55 W., which forms now a part of the city of Yankton; and on February 17, 1877, by the passage of chapter 1, of the Revised Codes, so changed the location as to include the whole of the city of Yankton. March 8, 1883, an act was passed appointing these defendants a commission to select, locate, and establish a seat of government for the territory, giving to them a discretion to select any place they should deem suitable, and thereon locate and establish such seat of government. That statute, so far as it affects the questions under consideration, is as follows:

"Section 1. The seat of government of the Territory of Dakota "is hereby removed from the city of Yankton, in the county of "Yankton and Territory of Dakota, and is located and established "as hereinafter provided."

"Sec. 2. That " (naming these defendants), "be, and they are "hereby, appointed commissioners for the purpose of locating the "permanent seat of government and the capitol building of the "Territory of Dakota."

* * * * *

"Sec. 4. On or before the first day of July, 1883, the com-
 "missioners, or a majority of them, shall select a suitable site for
 "the seat of government of the Territory of Dakota, due regard
 "being had to its accessibility from all portions of the territory
 "and its general fitness for a capital, when at least one hundred
 "thousand dollars shall be paid or guaranteed in money. If the
 "amount be not paid in money, then its payment to the territory
 "shall be secured by a bond, with good and sufficient sureties,
 "payable to the territory, which bond shall be approved by said
 "commissioners, or a majority thereof. And after the site is de-
 "termined upon as aforesaid, said commissioners shall secure good
 "and sufficient title deeds of at least one hundred and sixty acres
 "of land, upon which the capitol buildings shall be erected, and

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“ a sufficient amount of said grounds shall be laid out into squares
 “ and suitable landscapes, and the same is hereby declared to be
 “ the permanent seat of government of the Territory of Dakota,
 “ at which all of the public offices shall be kept, and at which all
 “ of the sessions of the legislature shall hereafter be held.”

* * * * *

“ Sec. 16. Until the territorial capitol buildings shall be ready
 “ for occupancy as provided by this act, the territorial officers shall
 “ temporarily keep their offices, archives, books, records, and pa-
 “ pers at the city of Yankton, unless the Governor shall designate
 “ some other place by written order, in which case the said officers
 “ shall remove their respective offices, together with the archives,
 “ books, records, and papers pertaining thereto, to the place so
 “ designated, within the time prescribed in such order.”

“ Sec. 17. Chapter 1, of the Political Code, and all acts or
 “ parts of acts in any manner in conflict with this act or repug-
 “ nant thereto, are hereby repealed.”

The defendants, having qualified, were proceeding to execute the duties and powers thus enjoined and conferred upon them, when this action was brought by the proper public officer to test their authority to thus act. It will be seen that an elementary question is presented. Can the Governor and legislative assembly delegate to these defendants the right to exercise power and authority expressly conferred by Congress upon the Governor and legislative assembly without power of substitution, express or implied? The question whether Congress derives all of its powers by delegation, or otherwise, may, perhaps, be an interesting one, but it has no application to this case, and indeed both parties admit that Congress derives its powers by delegation. This appellant says in his argument: “ In the United States the sovereignty re-
 “ sides in the people, and all legislative power is delegated. Con-

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“gress itself takes authority by delegation. The legislature of every state takes authority only by popular investiture, and the legislature of the territory stands upon the same footing, with the qualification that sovereignty over the territories rests in Congress, instead of the people in them.” And the respondent says, alluding to this proposition: “If I understand this argument, it is that the people have delegated to Congress and that Congress has delegated powers to the territories. So that the legislature of Dakota takes her powers two degrees removed from the people,—one step further in the descending scale. So that I take it as conceded that all the powers possessed by the Dakota legislature and by the executive of Dakota are delegated powers.”

The first inquiry which suggests itself is the relation of the territory to the general government and to Congress. This question was at an early day a subject of contention in the highest court of the nation, and has received successive judicial interpretations, from the time of Chief Justice Marshall till now, so that the rule is tolerably well settled.

In *American Ins. Co. v. Canter*, Chief Justice Marshal says, in delivering the opinion of the court: “In the mean time, Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution, which empowers Congress to make all needful rules and regulations respecting the territory or other property belonging to the United States. Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the fact that it is not within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence

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“ the power is derived, the possession of it is unquestioned. * * *
“ In legislating for them, Congress exercises the combined powers
“ of the general and state government:” 1 Pet., 542, 543.

The rule is now authoritatively defined and settled in *National Bank v. Yankton*, which is the latest expression from that court upon the question. The court says: “ It is certainly now too late
“ to doubt the power of Congress to govern the territories. There
“ have been some differences of opinion as to the particular clause
“ of the Constitution from which the power is derived, but that it
“ exists has always been conceded. * * All territory within
“ the jurisdiction of the United States, not included in any state,
“ must necessarily be governed by or under the authority of Con-
“ gress. *The territories are but political subdivisions of the out-
“ lying dominion of the United States. Their relation to the
“ general government is much the same as that which countries
“ bear to the respective states, and Congress may legislate for
“ them as the state does for its municipal organizations. The
“ Organic law of a territory takes the place of the Constitution as
“ the fundamental law of the local government. It is obligatory
“ on and binds the territorial authorities, but Congress is supreme,
“ and, for the purposes of this department of its governmental
“ authority, has all the powers of the people of the United States,
“ except such as have been expressly or by implication reserved in
“ the prohibitions of the Constitution. In the Organic Act of
“ Dakota there was not an express reservation of power in Con-
“ gress to amend the acts of the territorial legislature, nor was it
“ necessary. Such a power is an incident of sovereignty, and con-
“ tinues until granted away. Congress may not only abrogate
“ laws of the territorial legislature, but may itself legislate directly
“ for the local government. It may make a void act of the terri-
“ torial legislature valid, and a valid act void. In other words, it
“ has full and complete legislative authority over the people of*

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"territories, and all the departments of the territorial governments:" 101 U. S., 132, 133.

The condition of the territories is one of absolute dependence. The power of Congress over them is supreme, restricted, possibly, by some undefined limitations of the Constitution. Their very political existence may be abolished, or their territory may be carved up and attached to the surrounding states or territories. In the earlier organic acts for the government of the territories the legislative power was frequently, in the first instance, conferred upon the Governor and the Judges, all appointed by the President. See Organic Act for Arkansas, section 5; also for other territories.

I am unable to see that this case necessarily involves the discussion of any serious constitutional question. With great respect for the majority of the court, and for the learned Judge who so elaborately discusses grave constitutional questions in the majority opinion, it seems to me the proposition is so plain and so elementary, and the questions leading up to the principal question so thoroughly settled by judicial decisions, and so uncontested by text writers, there is very little chance for discussion. That Congress possesses the power to legislate for the territory, or to delegate the power of local legislation to the government of the territory, is not open to argument. That Congress might itself select and establish the seat of government, or might delegate that power to the Governor and legislative assembly, or to any other tribunal, is a proposition so well settled, and so plain, that the bare statement is enough to satisfy any intelligent legal mind. The question is not as to the power of Congress over the subject, but, Congress having delegated this power to select and establish and change the seat of government to the Governor and legislative assembly, the question is, in the absence of any express power of substitution, is there any implied authority in those tribunals to

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again delegate this duty to any other tribunal, body, or person? And, *second*, have they attempted to do so in this instance? Whether the selection and location of a new seat of government involved in a change are in their nature legislative or administrative, or partake of both, does not affect the question. Congress saw fit, in the exercise of its authority over the territorial government, in addition to the general grant of power to legislate upon all rightful subjects, consistent with the Constitution of the United States and the laws of Congress, to enact specifically that upon this subject the power to change the seat of government should rest with the Governor and the legislative assembly. These powers, whether legislative or administrative, required the exercise of discretion, judgment, and wisdom, and therefore, in the absence of express authority to that end, could not be redelegated. What rule is plainer than that when delegated powers involve the exercise of discretion, of judgment, of wisdom, in the agent, whether a legislative or an administrative agent, that no implied power of substitution exists; but the duties must be performed by the very agent upon whom they are devolved. If the Governor and the legislative assembly can delegate to a commission the authority to change the seat of government by the selection of a new locality, and designating it as the future seat, they may confer that power upon any person, in their discretion, and such authority may be again transmitted by such commission or person to others, or other, and from person to person, without limit. Where a delegated duty involves, as in this case, the exercise of those qualities of the mind known as discretion, judgment, wisdom, or patriotism, there is but one delegation of authority recognized in the law; that is, from the source or origin of the power, the principal to the agent, unless such agent shall be expressly, or by necessary implication from the appointment, clothed with the power of selecting and commissioning his substitute. “*Delegata potestas non potest delegari.*”

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In *Maxwell v. Bay City Bridge Co.*, 41 Mich., 453, the court say: "It is familiar law that no trust can be delegated by the person or body on whom it is conferred, but that very person or body, and no other, must execute it. * * * " Cooley says, in his *Constitutional Limitations*, page 139: "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain, and by the constitutional agency alone the laws must be made, until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

Congress, in almost every act for the organization of the territories, at least for the last 50 years, in addition to the general grant of powers to the territorial legislature, has also provided how the temporary and permanent seat of the territorial government should be located. Whatever might be the interpretation, had the general power, as expressed in section 1851, (substantially the same as section 6 of the Organic Act,) been the sole expression of the will of Congress, the passage of section 1944 must be considered as a grant or as a limitation of power. An old and correct rule of interpretation, is: "Where a charter contains a general clause, which afterwards descends to special words which are consentaneous to the general clause, the charter is to be interpreted according to the special words."

It was contended by the appellants upon the argument, and the same view seems to be entertained in the majority opinion, that

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the provisions of section 12, (1944) cited, so far as they relate to the location and change of the seat of government, are included in the grant of general powers of legislation, and that, therefore, this specific provision is to be given no force, and is to be regarded as merged in such grant of authority to legislate. From this it is argued that the power to designate these persons to select a new seat of government may be implied. No doubt, in the absence of any other provisions upon the subject, the right to change the seat of government of either state or territory might be included in the authority to legislate. But I submit the rule of construction contended for is not the true rule. All parts of a statute should be given force, if possible, and must be presumed to have their just meaning. This specific grant or delegation of power, in addition to the general powers conferred, is not to be ignored or treated as having no meaning or force. Congress must be presumed to have intended, by this separate and specific provision relating to the seat of government, just what is its plain and manifest meaning, to-wit: that the Governor and legislative assembly must exercise their judgment and their wisdom in selecting, in locating, in determining, the eligibility of the place for the seat of government of the territory, and must bring into play like functions in making the change. This duty, thus demanding of them the exercise of not mere mechanical force, Congress took care should be performed by these designated tribunals, and could not by them lawfully be conferred upon any one else.

The exercise of this duty by the tribunals selected by Congress cannot be said to be in any just sense the exercise of original powers, or, as applied to government, of sovereign powers. The Governor and legislative assembly are tribunals, the mere creatures of Congress. By Congress they are created and clothed with all the powers which they possess. These powers are in the

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largest sense mere delegated powers. They may at any time be resumed by the authority conferring them, or even after they are exercised may be repudiated and ignored. When Congress has thus said to its designated agents that they may do this thing which requires the exercise of the higher powers of intellect and spirit, how can it be said that Congress has impliedly authorized them to substitute some other agent to do the act expressly enjoined upon them?

It might be instructive to examine how Congress, in the different organic acts, has varied the mode of locating capitals in the territories. In some instances it has conferred the power solely upon the Governor and legislative assembly, while in other cases the place where the legislature shall first meet is fixed in the Organic Act, and the temporary seat of government is located by the Governor and legislative assembly, and the permanent seat is established by law when ratified by the people. See section 13, of the Organic Act of Minnesota.

In the Organic Act for Minnesota the legislature may prescribe *by law the manner* of locating the permanent seat of government of said territory by a vote of the people. In Dakota, Congress changed the mode of location. Instead of providing that the *manner of location may be prescribed by law*, it intrusts the power to the Governor and legislature. It is a significant fact that in nearly every Organic Act for the territories Congress has provided in express terms how the place where the legislature shall first meet shall be determined, in what manner the temporary seat of government shall be located, and how and by whom the location may afterwards be changed.

In the Organic Act for Dakota, we find: *First*, that the Governor shall appoint and direct the time and place where the legislative assembly shall hold its first session; *second*, that at the first

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session, or as soon thereafter as they shall deem expedient, the Governor and legislative assembly shall proceed to locate and establish the seat of government for said territory at such place as they may deem eligible; *third*, that the seat of government may be changed by the Governor and legislative assembly.

Could the Governor, in the first instance, have delegated the power to appoint and direct the place where the legislature should hold its first session to any man or body of men? Could the Governor and legislative assembly, at the first session, have transferred their power to fix the seat of government to any man or tribunal? Can the Governor and legislature, *by act of the legislature*, confer this power upon a body of men and invest them with all the discretion and powers conferred by Congress in section 1944, of the Revised Statutes?

But it is claimed that in *Nat. Bank v. Yankton*, cited above, the Supreme Court declares also that the organic law of a territory takes the place of the Constitution as the fundamental law of the local government. How does this change the question? If the Constitution of any state should contain a provision like that in our Organic Act, to-wit: that the seat of government may be changed by the Governor and legislative assembly, would any one claim that the duty thus especially enjoined upon the Governor and legislative assembly by the Constitution, could be by them transferred and placed upon another and different tribunal?

Our attention has been called to this fact that legislatures frequently delegate certain powers to cities, towns, county commissioners, etc. I think a careful and impartial consideration of this class of cases will satisfy any one that these matters are largely of local and police regulation, and may properly be delegated to each locality; that such questions so delegated do not affect the whole people, but only localities, like local option laws. In referring to

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the delegation of legislative powers to municipalities, Judge Cooley says: "The legislature, in these cases, is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the state; and when it interferes, as sometimes it must, to restrain and control the local action, there should be reasons of state policy, or dangers of local abuse, to warrant interposition:" Cooley, Const. Lim., 229.

In *State ex rel. Sanford v. Court of Com. Pleas*, 36 N.J. Law, 72, the court say: "In almost every city charter the right to regulate or restrain the sale of intoxicating liquors is expressly conferred; and it could be done only upon the theory that it is a police regulation, not strictly an exercise of law-making power." And again: "Such enactments are regarded as police regulations, established for the prevention of pauperism and crime, for the abatement of nuisances, and the promotion of public health and safety."

In referring to this and a similar class of cases, Mr. Cooley says: "Such laws are known in common parlance as local option laws. They relate to subjects which, like the retailing of intoxicating drinks or the running at large of cattle in the highways, may be differently regarded in different localities, and they are sustained on what seems to us the impregnable ground that the subject, though not embraced within the immediate power of the municipalities to make by-laws and ordinances, is nevertheless within the class of police regulations, in respect to which it is proper that the local judgment should control:" Cooley, Const. Lim., 148.

The language of Judge Caton, so relied upon, refers to local affairs, as a perusal of the whole case shows. The performance of the duty of selecting and locating the seat of government pertains

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to the whole territory, and the right to delegate those duties bears no analogy to the delegation of the right of local legislation or the performance of some duty pertaining to mere local concerns. In regard to mere local concerns the right to delegate authority is undoubtedly and necessarily inferred from the power to legislate upon all rightful subjects. But while that implication is held to exist, and nowhere denied, no court extends such implication to matters affecting the whole state. If the authority thus conferred upon the Governor and legislative assembly to change the seat of government is legislative in character, then clearly it is legislation pertaining to the welfare of the whole commonwealth. The power to delegate authority for general legislation or authority to legislate upon any subject general to the entire people of the state is everywhere denied: *Cooley*, Const. Lim., 116; *State v. Young*, 29 Minn., 474-551; *Barto v. Himrod*, 8 N. Y., 483; *Santo v. State*, 2 Iowa, 203; *Ex parte Wall*, 48 Cal., 279; *Brown v. Fleischner*, 4 Or., 132; *State v. Wilcox*, 42 Conn., 364; *Locke's Appeal*, 72 Pa. St., 491; *Rice v. Foster*, 4 Harr., (Del.) 479; *Lambert v. Ledwell*, 62 Mo., 188; *Lord v. Oconto*, 47 Wis., 386; *Meshmeier v. State*, 11 Ind., 482; *State v. Swisher*, 17 Tex., 441. If such authority is to be deemed administrative rather than legislative, the rule is equally uniform and unquestioned that it cannot be delegated: *Cooley*, Const. Lim., 205. "A trust created for any public purpose cannot be assignable at the will of the trustee." See *Maxwell v. Bay City Bridge Co.*, cited above.

In a well considered case recently decided by the Supreme Court of Minnesota the correct rule is declared. It appears that the charter of the city of Minneapolis gave the city council such powers as enabled the council to make reasonable regulations as to where or within what parts of the city the business of vending spirituous and malt liquors might be carried on. Under this

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power the mayor was authorized by the city council and did designate the districts or parts of the city where the sale should be allowed, which acts of the mayor were approved by the city council. A case involving this question was taken to the Supreme Court, and in the opinion the court say: "But this power to regulate is vested in the city council. It is a power which they cannot delegate to any person or officer. It is a legislative act which they must perform themselves, and they can only exercise it by ordinance enacted in the manner prescribed in the charter. Of course, they may impose mere executive or ministerial duties, such as approving the bond, receiving license fee, and issuing the license, on certain officers, as they have done in the present case. These are mere executive and ministerial acts to be performed in the execution of the ordinance; but they cannot delegate their legislative powers. The ordinance, in that respect, must be complete when it leaves the hands of the city council. The limits within which the sale of liquor should be confined is a matter which the council must determine. It calls for the exercise of legislative discretion. They can no more remit to the mayor the right to determine this than they can the question of the amount of the license fee. But this is, in effect, what they have done in this case:" *In re Wilson*, 19 N. W. Rep., 725.

I now arrive at the question: Does this act of the legislative assembly undertake to confer upon these defendants the power to change the seat of government from Yankton, the former location, to some other district of country, to be by them selected and designated? If it does, then it is a clear delegation of the power conferred by Congress upon the Governor and legislative assembly, and is void, and the duties thereunder cannot lawfully be performed by them. All of the duties to be performed by the defendants other than the selection of the seat of government depend upon such selection, and if the authority thus to select is wanting, the

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whole statute fails—there will remain no duty which the defendants can perform under the act. We are to give this, like other statutes, a reasonable interpretation. We are to view it in the light of common sense. We should endeavor to discover its real intent and meaning, upholding it, if we can, but unhesitatingly pronouncing its invalidity, if it shall be so found. *First*, let us inquire what is its purpose? For what purpose was it framed and proposed? Clearly for the purpose of effecting a change in the seat of government. It so declares. The Governor and legislative assembly were authorized to change the seat of government from Yankton, the then location, to some other place; they were seeking to do so. Did such enactment effect the change? If it did, then the change was made by the tribunal authorized to make it, but if the enactment left it to these defendants to effect such change, then it was merely an enactment clothing them with the power to do what such tribunal had been selected and empowered to do. We may gain some light in seeking the proper construction of this statute by ascertaining the meaning of the term “may be changed,” used in the law of Congress. Webster defines the verb “change” as “to put one thing in the place of another,” “to exchange,” “to alter or make different,” “to cause to pass from one state or place to another.” To effect a change in the seat of government necessitated the substitution of another place for Yankton, the then seat. No change would or could be effected without and until such other place was thus substituted. Declaring the seat of government removed from the city of Yankton did not effect a change. A removal could only be made by the substituting of some other district of country in lieu of the city of Yankton. The very gist and essence of the change was the selection and location of another place or district other than the city of Yankton. Now, by this enactment the defendants were appointed for the purpose of doing that very thing which was essential and

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absolutely requisite to effect a change in the seat of government. Section 4, in express terms, provides that "the commissioners, or "a majority of them, shall select a suitable site for the seat of "government of the Territory of Dakota, due regard being had to "its accessibility from all portions of the territory, and its general "fitness for a capital." Undoubtedly, this was conferring upon these defendants powers which required the exercise of discretion, of judgment, of wisdom, of patriotism; and it was putting upon them the performance of duties expressly enjoined upon the Governor and legislative assembly.

It seems to me that no other view can be taken of this enactment. The attempt was made to evade the act of Congress; to defeat its provisions. This was supposed, no doubt, to be accomplished by the provisions of this act, which declared the seat of government removed from the city of Yankton, and which repealed the former act of the legislative assembly locating and establishing the permanent seat of government at Yankton. But such attempt was futile. Until the minds of the legislators and Governor had, in the forms prescribed by law, concurred in selecting a suitable site for the seat of government, and manifested such concurrence in the legal mode, no removal did or could take place; and there was no more authority to confer upon these defendants the performance of a part of the duty, than there was to confer upon them the whole of the duty prescribed by Congress to be performed by the Governor and legislative assembly. No one would contend for a moment that, in direct terms, the legislative assembly could by law confer upon these defendants the power to change the seat of government. What cannot be done directly, can no more be done by indirection. As we have seen, to effect a change in the seat of government, a determination to remove it from the city of Yankton is necessary, and a selection and its location upon or in another district is essential.

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In this act the legislative assembly went so far as to determine upon its removal, but failed to select a place to which it should be removed. This latter duty, essential as it is to effect a change, was put upon these defendants. It would have been just as valid for the Governor and legislative assembly to have delegated to these defendants the power to determine whether it should or should not be removed, as to confer upon them the other duty—of selecting a suitable site to which such removal could be made. There was no power conferred upon the legislature and Governor to repeal the act locating the seat of government, and thus to cause an inter-regnum to exist, during which no seat of government was designated whereat the governmental functions were to be performed. The power given was to change; that is, to substitute another place for the place theretofore fixed upon. Now, necessarily, such change required the location of a new seat of government, and, necessarily preceding that, there must have been the selection of such new seat. Such selection involved the exercise of those qualities which could not be delegated. Still, we find in this act that these defendants are appointed for the express purpose of locating the seat of government—the new seat. Therefore, they are appointed to do the precise thing which the Governor and legislative assembly are authorized and empowered to do. This is a clear and unquestioned attempted delegation of such powers as cannot, by any rule of law, be delegated. It is an evident attempt at evading the plain letter as well as the spirit of the law of Congress, and ought to be barren in its results.

Let us illustrate: Suppose these gentlemen had never qualified or acted, and no others had been appointed in their stead, would the seat of government have been changed? Would any one contend for a moment that a change could have been effected without their action? If so, where to? The seat of government could not

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have been changed from Yankton into space. It would not have been changed by annihilating the seat of government. Again: Suppose the commission had selected Yankton as the most eligible place, in their judgment,—which, under the law, they might do,—would there have been a change? This illustrates how strange and singular is the construction sought to be put upon this statute, in an attempt to sustain it, by the argument that the seat of government was by the law changed, and not by these defendants. It would be a bolder, if not a more conclusive, legal proposition, to claim the right to delegate these delegated powers.

It is urged strongly that in determining this question of the legal construction of the organic law of this territory, we should consider “the convenience of such delegation, the obvious difficulties in the way of a direct selection by the legislature.”

Judge Story lays it down as a rule of great importance, “not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous.” Story on Const., Sec. 425. “Courts have nothing to do with the argument of inconvenience: *People v. Morrell*, 21 Wend., 583. “If the right claimed is conferred by implication, such implication must be a necessary, not a conjectural or argumentative, one.” *Field v. People*, 2 Scam., 83.

Looking to the rules which govern in determining the power of municipal corporations, (and they are authoritative in this case,) we find it stated that “the reasonable presumption is that the state has granted, in clear and unmistakable terms, all that it has designed to grant at all.” Cooley on Const. Lim., 234, 235.

“It must be taken for settled law that a municipal corporation “possesses and can exercise the following powers, and no others: “*First*, those granted in express terms; *second*, those necessarily “implied, or necessarily incident to the powers expressly granted;

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“*third*, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable:” *Merriam v. Moody*, 25 Iowa, 163.

“The general rule is, that a delegated power can be redelegated, in the absence of an expressed right of substitution, only when it is customary, necessary, or otherwise fairly to be presumed from the circumstances surrounding the transaction:” Story on Agency, Sec. 14.

Judge Bronson says, in *Oakley v. Aspinwall*, 3 N. Y., 568: “Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power; some evil to be avoided, or some good to be obtained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well people can amend it, and inconvenience can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority are pleased to call them.”

The following rule is invoked by the appellant, and approved in the opinion of the majority of this court: “If wisdom is to be

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“gained from the teachings of the past, and judicial decision is to be made in the light of governmental experience; if, as Caton said, we may ‘feel warranted in looking at the past to see what kind of laws legislative bodies have been in the habit of passing,’ in order to determine what are the proper limits of legislative authority, the attention of the court is now respectfully invited to a line of precedents upon the specific point in question which is without break or flaw, and absolutely authoritative in example.”

Let this rule be rigidly applied to the determination of this case. Certain precedents are claimed for the location of capitals by commissioners: *First*, by certain states; *second*, by territories; *third*, by Congress. A careful examination of all the cases cited will show whether these supposed precedents support the theory of the appellants or of the respondents. The state cases are Illinois and Nebraska; the territorial cases are Montana, Colorado, and Iowa; and the further case cited is that of the location of the federal capital. The appellant claims that each of these are cases in point in determining the application of the above rule.

In the case of Illinois the facts were these: The constitution of the state expressly authorized and required the legislature to appoint a commission to select certain lands, expected to be donated by Congress, upon which should be located the permanent seat of government. How this case can be twisted into a delegation of delegated powers is more than I can comprehend. The constitution was the expressed will of the sovereign. The legislature acted in accordance with that express will. Congress made the expected cession. The agents, authorized by the principal to be appointed, selected the lands out of such cession, whereon the seat of government was located. In the case of Illinois, then, all that can be claimed for it, and all that it is, treating

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the constitution as the voice of the sovereign people, the principal expressly conferred upon their agents—the legislature—the authority to, and made it their duty to substitute, for the purpose of the selection of such lands as should be granted by the government, other agents of the people.

In the case of the state of Nebraska its then constitution contained no provision in relation to the seat of government, except that the legislative assembly should meet at Omaha at its first session. The state possessed certain lands, situated within the limits of certain counties. These lands were limited in area. They had been granted to the state by the general government. It was determined to make them available for the erection of public buildings and the location thereon of the seat of government, and the state legislature authorized certain state officers, to-wit: the Governor, Secretary, and another, to select from these lands a section most suitable on which to build a city, and constituted it the seat of government for the state; and thereafter, by express provision in the subsequently adopted new constitution, fixed the locality as the permanent seat of government. It will be observed in this instance that no direction or prohibition was contained in the constitution governing or prescribing the duty of the legislature in this regard. They were the representatives of the sovereign power,—the principal; except as limited in the constitution their voice was the voice of the principal. The powers which they exercised were exercised by them possessing all power which the people possessed. This is the nearest in legislative precedent of any of the instances cited, but clearly distinguishable from this legislation, where the Governor and legislative assembly of the territory are exercising merely such powers as have been expressly or by necessary implication conferred upon them by the source of power, the Congress of the United States.

The next case is that of Iowa. On January 21, 1839, the terri-

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territorial legislature passed an act authorizing a commission to select a location for the seat of government, restricting them to the county of Johnson. On the same day a supplemental act was passed, which provided that no further steps should be taken, after the selection and report thereof to the Governor, until the consent of the United States should be obtained, and also authorized the Governor to apply to Congress for a donation of four sections of land on which to locate the seat of government; and also, on the same day, by resolution, instructed the Delegate to Congress to ask for such donation of land on which to locate the seat of government, to be selected by the commissioners; thus showing beyond controversy that nothing could be, or was intended to be, done *until Congress had acted and consented to this mode* of locating the seat of government.

It will thus be seen that in the Iowa case the commission was limited to a single county, and the legislature provided that nothing should be done until *the consent of the United States was obtained*. Congress did consent, and furnished the means to carry into execution the act of the Iowa legislature before a step was taken towards the location of the site of the capitol. With the act of the Iowa legislature constituting the commission before Congress, and waiting its approval, Congress approved the mode by furnishing the land to be selected under the *authority of the territorial legislature*, and not by the Governor and legislative assembly. It was an emphatic and unmistakable approval, which, to that extent, amounted to a modification of the original Organic Act of Iowa.

The next case cited is that of Montana. Section 1945, of the Revised Statutes of the United States, provides as follows: "That the seat of government shall not be at any time changed except by an act of the assembly, duly passed and approved, after due

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“notice at the first general election thereafter, by a majority of the legal votes cast on that question.” When the capital of that territory was changed, no commission was created, or sought to be created, but an act to change the location passed the assembly which was approved by a majority of the legal votes cast on that question, in exact accordance with the provisions of the Organic Act.

The appellants' next case is that of Colorado. In that case the location was restricted by the legislature to the town of Colorado. In other words, the legislature designated the town of Colorado as the capital, and appointed commissioners to designate the location of the territorial buildings within such town. Great stress was laid by the counsel upon the act of Congress authorizing the appointment of a commission to survey, limit, and define the boundaries of a district of country 10 miles square, which “may by cession of particular states and the acceptance of Congress become the seat of government of the United States.” See Article 1, Sec. 8, of Constitution of the United States.

Where this district should be located, and where the permanent seat of government should be established, early attracted the attention of Congress. A partial review of the history of this act may be instructive. Hamilton was Washington's secretary of the treasury. He was anxious to secure the passage by Congress of certain financial measures, and among them the assumption by the general government of the debts contracted by the several colonies or states for the maintenance of troops during the war. He imagined that the stability of the new government depended on the passage of these measures. The northern members very generally favored assumption. The Virginia members, with one exception, opposed it, but were anxious to secure the capital on the Potomac. Harrisburg, Baltimore, New York, Germantown, Philadelphia, Wright's Ferry, on the Susquehanna, and some point near Georgetown, on

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the Potomac, were the contending places for the seat of government.

A late biographer of Jefferson says: "And so the debate went on day after day. The Susquehanna men triumphed in the house, but the senate sent back the bill with 'Susquehanna' stricken out and 'Germantown' inserted. The house would not accept the amendment, and the session ended before a place had been agreed upon. The subject being resumed in the spring of 1790, it was again productive of heat and recrimination; again the south was outvoted, and the Potomac rejected by a small majority. Baffled in the house, southern men renewed their efforts over Mr. Jefferson's wine and hickory nuts in Maiden Lane. Two sets of members were sour or savage from the loss of a measure upon which they had set their hearts. Southern men had lost the capital and northern men assumption. Then it was that the original American log-roller (name unrecorded) conceived the idea of this bad kind of compromise. The bargain was this: Two southern members should vote for assumption, and so carry it, and in return for this concession Hamilton agreed to induce a few northern members to change their votes on the question of the capital, and so fix it upon the Potomac. It was agreed at length that for the next ten years the seat of government should be Philadelphia, and finally near Georgetown. How much trouble would have been saved if some prophetic member had been strong enough to carry a very simple amendment to strike out ten years and insert one hundred. And in that case what an agreeable task would have been devolved upon this generation of repealing Germantown and beginning a suitable capital at the proper place. To the last of his public life Jefferson never ceased to regret the part he had innocently taken in this bargain." Parton's Life of Jefferson, 394.

Chief Justice Marshall says, in his Life of Washington, vol. 2,

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page 190: " At length a compact respecting the temporary and
" permanent seat of government was entered into between the
" friends of Philadelphia and the Potomac, stipulating that Con-
" gress should adjourn to and hold its sessions in Philadelphia for
" ten years, during which time buildings for the accommodation
" of the government should be erected at some place on the Poto-
" mac, to which the government should remove at the expiration
" of the term. This compact having united the representatives of
" Pennsylvania and Delaware with the friends of the Potomac in
" favor of both the temporary and permanent residence which had
" been agreed on between them, a majority was produced in favor
" of the two situations, and a bill which was brought into the sen-
" ate, in conformity with this previous arrangement, passed both
" houses by small majorities. This act was immediately followed
" by an amendment to the bill, then pending before the senate, for
" funding the debt of the Union. The amendment was similar in
" principle to that which had been unsuccessfully proposed in the
" house of representatives. By its provisions twenty-one millions
" five hundred thousand dollars of the state debts were assumed in
" specified proportions, and it was particularly enacted that no cer-
" tificate should be received from a state creditor which could be
" ascertained to have been issued for any purpose other than com-
" pensations and expenditures for services or supplies towards the
" prosecution of the late war and the defense of the United States,
" or of some part thereof during the same. When the question
" was taken in the house of representatives on this amendment,
" two members, representing districts on the Potomac, who in all
" the previous stages of the business had voted against the assump-
" tion, declared themselves in its favor, and thus the majority was
" changed."

Attention is also called to the works of Madison, to the Life of
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Hamilton, by Lodge, page 123, and a very exhaustive review of this legislation will be found in Schaif's History of Maryland, commencing on page 564.

The location finally adopted was the result of a trade by which two of the "Potomac members" voted for the assumption of the state debts, in return for which northern members voted for the Potomac location. See Jefferson's Works, IX, 93. This is mentioned to show that when Congress decided to locate the seat of government upon the Potomac it exercised a positive choice and made the selection as definitely as under the circumstances was required. The Susquehanna, the Delaware, and all other localities were rejected, and the commissioners had nothing to do but to select the best site within the tract designated. When it is considered that the country was at that time but sparsely settled and little known, the limitation to a tract but five or six times the size of the district to be taken is small enough. When the heat of the contest is considered, displaying as it did the beginning of that sectional feeling between north and south which has raged so long, and when regard is had to the price which the south paid for the location—the voting for the assumption of state debts which had already been rejected by the south—it is hardly possible to claim that this is a precedent for giving to a board of commissioners an unlimited power of selection. Moreover, there are marked differences in the purpose and scope of these two acts. Congress having chosen the locality, and even specified that the buildings should be on the east bank of the Potomac, provided for the appointment of commissioners by the President to carry out the necessary work of detail; in a word, experts, surveyors who should "survey, define, and limit a district of territory within the limits named." These commissioners were not called upon to decide where within the United States the federal seat of government should be, comparing the advantages of various localities as to

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accessibility and general fitness, but simply to select within the prescribed territory such a district as was best fitted for the site of public buildings and for the laying out of a city. When Congress passed that act it practically fixed the location of the capital of the United States. Had this bill been equally definite it would have confined the location to some county; for illustration, say the county of Beadle, or Davison, or Spink, or to a point on the east bank of the Missouri river, between the mouth of Medicine creek and Fort Sully, in Dakota; or, perhaps, on the east bank of the Missouri river above the mouth of Apple creek.

In any of these cases would there have been any doubt but the legislature had exercised its judgment, had approximately fixed the location of the capital, and not delegated to a commission all the discretion which could be exercised? In every case when a commission has been provided for to select the location of a capital, the legislature, or Congress, as the case may be, *has designated its choice so definitely as to exclude all contending points for the location, except one*, with the sole exception of the state (not territory) of Illinois, where the mode of selection was definitely fixed in the constitution.

From the whole case I must conclude that the act of the territorial legislature creating the capital commission was unwarranted and invalid, and that the judgment of the District Court should be affirmed.

BUSH ET AL. V. THE NORTHERN PACIFIC R. R. Co.

1. INSTRUCTIONS: ASSUMING UNDISPUTED FACTS IN EVIDENCE: NOT ERROR. In an action against a common carrier to recover damages for negligence in failing to safely carry and deliver property, all the witnesses testifying to

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some loss, and the only conflict in the testimony being as to the amount of the loss: Held, not error for the court to assume that there was some damage or loss, and to instruct the jury that the only question upon that part of the case was as to the amount of the loss sustained by plaintiffs, and this the jury were to find.

2. **ASSIGNMENT OF ERROR: INSUFFICIENT.** The particular error relied upon in a motion for a new trial, or upon which a reversal of the judgment is demanded, should be pointed out, and, unless so presented, assignments of error will not be considered; following the decision of this court in *Caulfield v. Bogle*, 2 Dak., 464.

Appeal from the District Court of Stutsman County.

The case is stated in the opinion.

White & Hewitt, for defendant and appellant.

Johnson Nickeus, for plaintiffs and respondents. No briefs on file.

HUDSON, J.—This action was brought by the plaintiffs and respondents against the defendant and appellant to recover of the defendant as a common carrier damages sustained upon a contract for the transportation of goods. The plaintiffs allege among other things, that on the 26th day of April, A. D. 1882, the defendant, in consideration of \$40.90, agreed to carry from Minneapolis, in the State of Minnesota, to Jamestown, in the Territory of Dakota, and there deliver to the plaintiffs certain goods, consisting of about twenty-eight bushels of corn, of the value of \$24.97, and three hundred and eighty-eight bushels of oats, of the value of \$258.97, the property of the plaintiffs, which was delivered to the defendant, who received the same upon the agreement, for the purpose above mentioned; that the defendant did not safely carry and deliver said goods mentioned in pursuance of said agreement,

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but on the contrary the defendant so negligently conducted its business as a common carrier that the corn and oats were wholly lost, to the damage of the plaintiffs of \$387, for which they demanded judgment. The defendant answered by a general denial of the plaintiffs' claim. On the trial before the jury, the plaintiffs, to support their case, called six witnesses, who were duly sworn and testified. The defendant introduced no proof. The case was submitted to the jury, under the charge of the Court, who, after deliberation, found a verdict for the plaintiffs in the sum of \$310.83. A motion by defendant for a new trial was overruled by the Court, and judgment was entered upon the verdict, from which the defendant appealed. The case is presented to this court upon the brief of the appellant, no oral argument having been made, and no brief was filed by the respondents. The appellant assigns seven grounds of error as occurring at the trial, upon which a reversal of the judgment is demanded. The first four of these grounds of error relate to the charge of the Court to the jury, and may all be considered together. That portion of the charge of the Court to which exception is taken, is as follows:

"The only question for you to consider is what amount there
"was short when the grain reached here (Jamestown.) The
"amount of shortage is really the dispute in this case, and to
"determine that question of course you must take into consid-
"eration all the facts connected with the case. The cars, it seems,
"were thrown from the track, and the company got the grain out,
"and transferred it to other cars as soon as they could, and sent
"it on to Jamestown. You have heard from the witnesses when
"it arrived there. After being notified that the cars were here
"they went and measured it, and they found, as they say, a short-
"age. The plaintiffs' witnesses have come upon the stand and
"they tell you the amount of shortage that they found, and how
"they found it, on the corn and on the oats. Counsel for the de-

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“ defendant has called out on cross-examination some testimony
“ with regard to what took place at the time the grain was taken
“ from the wrecked cars and put into other cars, and some testi-
“ mony showing that there was but little loss or but little waste
“ at the time. The amount of waste on the corn, it is claimed by
“ the counsel, was not to exceed some ten bushels in the trans-
“ shipment. The waste on the oats does not appear. The wet
“ oats were left in the car; the dry oats were put in another car
“ and forwarded, and these plaintiffs, as it is said, took the grain
“ from the cars and measured the amount, and kept an account of
“ it, and you have heard their statement here. It is for you to
“ determine what was the shortage for which the company is lia-
“ ble. It is a fair dispute or misunderstanding about this claim,
“ and the defendant never has paid it, because it never became
“ satisfied how much it ought to pay. You are here now to say
“ how much they ought to pay; and you must go to your room,
“ consider this matter carefully and honestly, and with the inten-
“ tion of doing justice between the parties, as near as you can.”

It is contended by the counsel for defendant that the Court assumed in the charge certain facts as proven that should have been passed upon by the jury—namely, that there had been a loss. But it appears from this record that no witness has said there was no loss. Four of these witnesses were the employes of the company at the time the accident occurred, and assisted in taking out the grain and transferring it to other cars. Mr. Daley, the freight and express agent of the defendant company, says there was a wreck below Sanborn, and he went down to look after the freight there. These two car-loads of grain were in the wreck, the oats in the water; the corn was dry; the car lying on its side; “ I could not see that a bushel of corn was wasted; there might have been a bushel.” This is the nearest any witness has come to disputing the loss. Mr. Daley says he sold the wet oats and remitted

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the funds to the freight agent of the company. He further says that he told Bush to make out his bill and send it in to the company; "they will undoubtedly adjust it." Defendant's counsel conceded that the train containing the cars in question was brought west from Fargo, April 21; reached Sanborn, April 22, and was there wrecked.

He also admitted on the trial that the bill of the grain shipped was correct, and the amount stated for freight paid was also correct. The charge of the Court should be based upon the evidence in the case; and in this case there was no testimony except what was given by the plaintiffs' witnesses, and they all concurred in the statement that the cars containing the grain were thrown from the track into the water, and that both corn and oats were lost, but they disagree as to the extent of the loss; some of them said there was but little.

It is difficult to see how there was any question of fact to be submitted to the jury, except as to the extent of the loss. No other point was questioned on the trial. How could the Court have told the jury to weigh the evidence and determine the question whether there was any loss, when there was not a scintilla of evidence tending to deny the fact which was testified to by all the witnesses? There was no conflict in the testimony on the question of loss; there was no evidence to be weighed, and no preponderance to be found.

The counsel for the defendant seems to have taken great pains to produce authority showing the duty of the Court in charging the jury, all of which is good law when there are facts to which it may be applied. There was no conflict except as to the amount of the loss. All of the witnesses testify to some loss on the grain. In this case if the damages had been liquidated and made certain, the Court might, and it would have been its duty to have directed

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a verdict for the sum thus made certain, but as the only question on which there was any disagreement of witnesses was the extent of the loss, that question was properly submitted to the jury.

The fifth assignment is as follows: The jury erred in its verdict. *Sixth*—the Court erred in its judgment, based upon said verdict. *Seventh*—the Court erred in overruling the motion of the defendant for a new trial.

Neither of these assignments of error can be considered, for the reason that they were not properly presented to the court on the motion for a new trial. No compliance has been made with the statute or the rules, as will be seen by reference to the decision of this court, in the case of *Caulfield et al. v. Bogle*, 2 Dak., 464. The particular error upon which the motion for a new trial, or a reversal of the judgment is relied upon should be pointed out.

Finding no error in the record, the judgment of the District Court is,

AFFIRMED.

All the Justices concur.

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1. INTEREST: CONTRACT TO PAY INTEREST ON UNPAID INTEREST, VALID. A promissory note providing for the payment of interest annually, and stipulating that each annual installment of interest not paid when due, should bear interest at a specified rate from the time it fell due till paid: Held, valid and legal.
2. TENDER: INSUFFICIENT, VOID FOR EVERY PURPOSE: ATTORNEY'S FEE RECOVERABLE. A tender of an amount insufficient to cover the principal and interest due on a note and mortgage, is ineffectual for every purpose; and in such case, in an action to foreclose the mortgage, the attorney fee therein stipulated may be recovered.

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3. **REDUCED RATE OF INTEREST: AGREEMENT TO ACCEPT.** Where it was the clear intention of the parties that an agreement to accept a reduced rate of interest should be held operative and binding upon the parties, only upon condition that the interest at the reduced rate was paid at the time when, by the terms of the agreement, it became due: Held, the interest at the reduced rate not having been paid, the original rate of interest was enforceable.

Appeal from the District Court of Minnehaha County.

The facts are fully stated in the opinion of the court.

Bartlett Tripp and *Wilkes & Wells*, for defendants and appellants.

Winsor & Swezey, for plaintiff and respondents. No briefs furnished

PALMER, J.—This is an action brought to foreclose two mortgages securing a promissory note executed by Margaret Edmison and James Jamison, and the litigation between the parties occurs mainly upon the question of interest, the plaintiff claiming that there should be annual rests in the calculation of the interest; that is, that as the note specifies that the interest should be payable annually; and further says, that if the interest is not paid when due such interest from that time shall draw interest at the rate of 12 per cent. per annum,—that he is entitled to calculate interest as stipulated by the note. The plaintiff offered in evidence the note in question, which is as follows:

\$2500.00.

VINTON, Iowa, March 6th, 1879.

On the sixth day of March, 1881, for value received, we promise to pay Elijah A. Hovey or order, twenty-five hundred (\$2500.00) dollars, with interest thereon at the rate of 12 per cent. per annum, payable annually at Sioux Falls, D. T.

Should any of the interest not be paid when due, it shall bear interest at the rate of 12 per cent. per annum, and a failure to pay any of said interest within thirty days after due, shall cause the whole note to become due and collectable

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at once. It is also stipulated that should suit be commenced for the collection of this note, a reasonable amount shall be allowed as attorney's fee and taxed with the costs in the suit.

Due, March 6th, 1881.

P. O., Vinton, Benton Co., Iowa.

No. 70.

JAMES JAMISON,

MARGARET EDMISON.

Upon the above note were the following indorsements:

March 17th, 1880, received \$150.00 on interest.

(Indorsed in pencil.)

Interest 10 per cent. after May 6th, 1881, for one year.

Plaintiff introduced in evidence two mortgages, each duly acknowledged and recorded, and each mortgage containing a stipulation for attorney's fees, as follows: "And the said parties of
" the first part do hereby further covenant and agree that they
" will pay all taxes and assessments of every nature that may be
" levied upon said premises, before the same shall become delin-
" quent, and keep said premises thereon insured for at least \$2,-
" 500.00 loss, if any, payable to the mortgagee, as his interests
" may appear, and will also pay the sum of \$75.00 as attorney's
" fees in case of a foreclosure of this mortgage by reason of the
" non-performance of any of the conditions hereof by said parties
" of the first part; and in case default shall be made in the pay-
" ment of the said sum of money, or any part thereof, at the time
" or times above specified for the payment thereof, or in case of
" the nonpayment of any taxes as aforesaid, or the breach of any
" covenant or agreement herein contained, then and in either case,
" the whole principal and interest of said note shall, at the option
" of the holder thereof, immediately become due and payable; and
" it shall be lawful in such case, for the said party of the second
" part, his heirs, executors, administrators or assigns, to grant,
" bargain, sell, release and convey the said premises with the ap-
" purtenances thereunto belonging, duly authorized, constituted,
" and appointed to make, execute and deliver to the purchaser or

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“ purchasers, his, her or their heirs or assigns forever, good, ample
“ and sufficient deeds of conveyance in the law, and out of the
“ moneys arising from such sales, after deducting all expenses
“ thereof, together with all sums paid on taxes, cost of advertising
“ or insurance on said premises and the said sum of \$75.00 attor-
“ ney’s fees as aforesaid, to retain the principal and interest that
“ may be due on said note, rendering the surplus moneys, if any
“ there be, to the said parties of the first part, their heirs, exec-
“ utors, administrators or assigns on demand.”

The court trying the cause, made the following findings of fact from the evidence:

I. That on the 6th of March, 1879, the defendants, Margaret Edmison and James Jamison, made their promissory note, bearing date on that day, in the words and figures following, viz.:

\$2,500.00.

VINTON, IOWA, March 6th, 1879.

On the 6th day of March, 1881, for value received, we promise to pay Elijah A. Hovey or order, twenty-five hundred dollars (\$2500.00) with interest thereon at the rate of 12 per cent. per annum, payable at Sioux Falls, D. T.

Should any of the interest not be paid when due, it shall bear interest at the rate of 12 per cent. per annum, and a failure to pay any of said interest within thirty days after due, shall cause the whole note to become due and collectable at once. It is also stipulated that should suit be commenced for the collection of this note, a reasonable amount shall be allowed as attorney’s fee and taxed with the costs in the case.

Due, March 6, 1881.

JAMES JAMISON.

P. O., Vinton, Benton Co., Iowa.

MARGARET EDMISON.

II. That the said defendants, Margaret Edmison and Percival H. Edmison, to secure the payment of the principal sum and the interest thereon as mentioned in said note according to the tenor thereof, did execute under their hands and seals and deliver to the said plaintiff a certain mortgage bearing date the 5th day of July, 1879, and a condition for the payment of the said sum of twenty-five hundred dollars and interest thereon at the rate, and at the

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times and manner specified in said note and according to the conditions thereof, on the southeast quarter of section number 13, in township 101, of range 49, in the county of Minnehaha, and Territory of Dakota.

III. That said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and was afterward recorded on the 14th day of July, 1879, in the office of the register of deeds of the county of Minnehaha, D. T., in book "E" of mortgages, on page 211.

IV. That the said defendants, James Jamison and Margaret Jamison, to secure the payment of the same said principal sum and the interest thereon as mentioned in said note according to the tenor thereof, did execute under their hands and seals and deliver to the said plaintiff, a certain other mortgage bearing date the 5th day of July, 1879, and conditioned for the payment of the said sum of twenty-five hundred dollars and interest thereon at the rate, and at the times and manner specified in said note and according to the conditions thereof, on the following described lands in Minnehaha county, D. T., viz.: Lot No. 18, of block No. 16, of J. L. Phillips' Addition to Sioux Falls.

V. That said mortgage was duly acknowledged and certified, so as to entitle it to be recorded, and the same was afterwards, on the 14th day of July, 1879, duly recorded in the office of the county register of deeds, of the county of Minnehaha, D. T., in book "E" of mortgages, on page 212.

VI. That the defendants, Margaret Edmison and Percival H. Edmison, covenanted and agreed in the said mortgage executed by them, that in case of foreclosure of said mortgage, they would pay the sum of seventy-five dollars as attorney's fees.

VII. The the defendants, James Jamison and Margaret Jamison, covenanted and agreed in the said mortgage executed by them,

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that in case of foreclosure of said mortgage, they would pay the sum of seventy-five dollars as attorney's fees.

VIII. That no part of said principal or interest has ever been paid, except the sum of one hundred and fifty dollars paid March 17th, 1880.

IX. That at the time said note and mortgage were executed there was a mutual mistake as to the amount of said note, which should have been in the sum of two thousand four hundred and eighty-seven and one half dollars, instead of two thousand five hundred dollars.

X. That on or about the sixth day of March, 1881, it was mutually agreed between the plaintiff and defendants, that the principal sum mentioned in said promissory note should, from and after the 6th day of March, for the term of one year, bear interest at the rate of ten per cent. per annum, and that defendants should have the use of it one year from said 6th day of March, 1881, at said rate of interest.

XI. That said plaintiff is the owner and holder of said note and mortgages.

XII. That no proceedings at law, or otherwise, have been had to recover the sums secured by said note and mortgages, or any part thereof.

XIII. That prior to the commencement of this action and about the 17th day of July, 1883, defendants tendered to plaintiff as full satisfaction of said note and mortgages, the sum of \$3,456.85, at Sioux Falls, D. T., which the plaintiff refused to accept.

And as conclusions of law therefrom *pro forma*:

I. That there is now due and unpaid to the plaintiff upon said note and mortgages the sum of \$2,487.50 as principal, and interest on said sum at the rate of 12 per cent. per annum, and the interest

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on each annual payment of interest at the rate of 12 per cent. per annum from the sixth day of March of each year since the giving of said note—namely, March 6th, 1879, less the payment of \$150 00 March 17th, 1881, amounting in all to the sum of \$4,267.79; and that plaintiff is entitled to recover said sum.

II. The plaintiff is entitled to recover the sum of one hundred and fifty dollars as attorney's fees as stipulated in said mortgages, and his costs and disbursements in this action.

III. That plaintiff is entitled to a judgment of the sale of the premises described in said mortgages to realize the aforesaid amount of \$4,267.79, together with the aforesaid attorney's fees, costs and disbursements; and that the defendants and all persons claiming under them, or either of them, subsequent to the commencement of this action, be barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises and every part thereof, unless redeemed according to law, etc.

IV. That plaintiff is entitled to a judgment against the defendants, James Jamison and Margaret Edmison, for the amount of any deficiency that may arise after applying all the moneys arising from said sale on said judgment, if the sale of the said premises should not realize sufficient money to pay the full amount due on said judgment at the time of sale.

By the Court,

C. S. PALMER,

Judge.

Whereupon defendants' motion for a new trial having been by the court denied and overruled, a judgment was duly entered in favor of plaintiff and against defendants, in accordance with the findings made by the court.

And now after the trial in this action and before judgment, comes the plaintiff and asks leave of the court to amend his said

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complaint herein, in conformity to the proofs, in the following, to-wit:

I. In the 8th paragraph of plaintiff's complaint, in the 3d line and 8th line, to have the word May changed to March.

II. That the 12th paragraph of plaintiff's complaint be changed to read as follows, viz.:

" 12th. And the plaintiff further alleges that there is now due " and unpaid to plaintiff upon said note and mortgages the sum " of \$2,487.50 principal, and interest upon said sum at the rate " of 12 per cent. per annum, and the interest on each annual " payment of interest at the rate of 12 per cent. per annum from " the 6th day of March, of each year since the giving of said note, " viz.: March 6th, 1879, less the payment of \$150.00, above set " forth."

Which motion was allowed, and to which the defendants duly excepted.

ASSIGNMENT OF ERRORS.

1. The court erred in findings Nos. 6 and 7 of plaintiff.
2. The court erred in permitting the amendment after trial of complaint.
3. The court erred in refusing to find that defendants made a tender and offer of payment on or about July 28th, 1883, of \$3,-550.00.
4. The court erred in refusing to find that said principal note was from and after March 6th, 1882, to bear interest at rate of 8 per cent. per annum.
5. The court erred in refusing to find defendants' findings of facts Nos. III and V.
6. The court erred in conclusions of law numbered "First," allowing interest upon each annual installment of interest; also in

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conclusion *second*, allowing \$150.00 attorney's fees; also in conclusion *third*, decreeing judgment of a sale of the premises described in mortgages.

7. The court erred in refusing the defendants' findings of fact, Nos. VIII and XI and XII; also in refusing the defendants' conclusions of law.

8. The court erred in overruling defendants' motion for new trial, and to correct findings.

Perhaps the most important question presented by the record in this case, is that raised by the *sixth* assignment in error, by which it seems the court below allowed interest on the sum found due upon the note, at the rate of 12 per cent. per annum, and interest on such annual unpaid sum of interest at the rate of 12 per cent. per annum, from the date of the note in question till the date of judgment.

Section 1096, of the Civil Code of this territory, is as follows:

"When a rate of interest is prescribed by a law or contract without specifying the period of time by which such rate is to be calculated, it is to be deemed an annual rate."

Section 1098: "1. The highest rate of interest which shall be lawful for any person to take, receive, retain, or contract for in this territory shall be 12 per cent. per annum, and at the same rate for a shorter time."

"2. Unless within the above limitation there is an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per cent. per annum, after they become due on any instrument of writing except a judgment, and on moneys lent or due on any settlement of accounts from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him."

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Section 1102: "Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation."

In view of the above provisions of our law, then, what effect must be given to the contract in this case relating to the payment of interest? By the contract the interest was payable on the sixth day of March, 1880; that is, the first interest which became due under the contract, was one year from the date of the note.

No portion of that interest was paid at that time. On the 17th day of March, eleven days after the first installment of interest became due, the defendant paid \$150.00 as interest. No further sums either as principal or interest were paid upon said note previous to the commencement of this action.

The court below after applying the \$150.00 in part payment of the first year's interest, allowed annual interest upon the principal sum, and also allowed annual interest or annual rests, in computing the interest upon the unpaid installments of interest from the time they became due till the time of judgment.

By so doing it is strenuously urged the court erred, and it is insisted that a court exercising its chancery powers will not enforce a contract for the payment of interest upon interest after the same becomes due; and many cases English and early American are cited in support of this doctrine.

Perhaps the first question here presented is, what were the rights and liabilities of the parties at the close of the first year, with the interest of that year unpaid? Clearly a right to maintain an action to recover it, on the part of the creditor, and a corresponding liability on the defendant to pay the same.

The plaintiff was a resident of, and the contract was executed in Vinton county, Iowa. The defendant and security were located in

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Minnehaha county, Dakota. The parties thus separated, one without the jurisdiction of this court, see fit for some purpose known to themselves, to embrace in their contract that interest should bear the same interest per annum as the principal, if it was not paid when due by the terms of the contract.

No reason seems to exist why the parties should not do just what they evidently intended to do here, viz., make the interest upon this debt payable annually, although the principal debt was not due for two years; but some of the authorities cited by respondent's counsel, go so far as to deny the parties the legal right to enter into a contract of this character. We conclude, however, from a large preponderance of the authorities, that \$298.50, the interest upon the principal sum for one year, was due and payable on the 6th day of March, 1880. This sum belonged to the plaintiff at that time by the terms of the contract. But it is insisted that if said first year's interest was not paid when due, no contract concerning interest upon said sum of \$298.50 would be binding and enforceable in this form, if embraced in the original contract. It is difficult to find a satisfactory reason to assign why, if the parties kept within the limits prescribed by law, they should not be permitted to make any arrangement concerning the payment of the interest accruing within the life or period covered by the written contract.

The note in question was payable in two years from its date, with interest at twelve per cent. per annum, *payable annually*, with a further provision, that "should any of the interest not be paid when due, it should bear interest at the rate of twelve per cent. per annum." This was such a contract as the parties had a right to make, and was binding upon them at all times, till by the terms of the contract the whole debt became payable. This is in accord with the rule adopted by the court below, as far as the first two annual installments of interest are concerned. Interest was

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allowed on the first year's unpaid interest (after deducting the first payment) to the date of the judgment. The same was done with the second year's unpaid interest.

In this it is seriously insisted the court erred; and it is argued that this basis of computing the interest is "compounding," and that courts of equity will not favor or enforce such contracts; and our attention has been called to many chancery decisions tending to establish this doctrine. But was the rule of computation adopted by the court below "compound interest?"

"The words compound interest mean interest added to the principal as the former becomes due, and thereafter made to bear interest." Sec. 2127, Civil Code.

Simple interest is the straight interest computed on the principal sum from the time when by the terms of the contract interest is to commence, to the time of payment or judgment. Neither of these methods seems to have been adopted by the court below in computing the interest on the note in suit, but a middle course was adopted and the interest was figured on each year's unpaid interest from the time it became due to the date of the judgment and at the rate provided by the terms of the contract. This, we think, was annual interest. It will be borne in mind that the rate of interest provided by this contract is within the limits provided by law. We have, therefore, had less occasion to endeavor to devise means and authorities wherewith to meet the "genius of rapacious creditors" than to strive to give to this contract just such force and meaning as the parties intended for it at the time of execution; and it must be admitted that the courts not only of this country but of England, have failed to find any common ground upon which all can stand, or any universal rule which should govern all species of contracts for the payment of interest and applicable to all conditions of our country. *Hoyle v. Paige*, cited by counsel for appellant as conclusive upon the question of

interest accruing after the principal debt becomes due, was a case where in the absence of any law authorizing it, the parties contracted and it was "expressly agreed that in case the interest was not paid at the end of each year said interest should become principal and draw interest as principal." And this was a contract payable in one year, and the learned Judge attempts to discriminate between such a contract and one where by the terms of the contract payments of interest would fall due by themselves previous to the time of payment of the principal sum. But the court in that case does hold (and we think contrary to the great weight of authority) that simple interest only should be computed, notwithstanding the contract called for annual interest. The learned Judge seeming to be willing to allow that State to stand committed to the principle adopted by Chancellor Kent in the early chancery case of *Connecticut v. Jackson*, 1 Johns. Chancery, 13, without question, rather than accept what seems to us to be the better rule as laid down by most of the other courts of the country.

Vermont was early committed to the same rule, following the lead of the early Massachusetts cases and the chancery case cited above. And a very eminent jurist (Isaac F. Redfield) in discussing this question, says: "It has long been settled in this State, doubtless upon the authority of the early cases cited from Massachusetts, that the parties may make the interest payable at any time short of the time fixed for the payment of the principal sum. In such case if the interest is not paid when it falls due, suit may be immediately brought for the sum due, and a recovery had for that *with interest upon it* from the time it fell due, by way of damages for the delay. The interest is thus treated as a separate installment of the principal sum. In such case, if no suit be brought until the whole sum be due, the interest will be computed on the several successive installments of

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“ interest as so many distinct causes of action blended in one suit.
“ But the interest upon the interest is allowed in these cases by
“ way of damages for the delay of payment and not as any portion
“ of the stipulated interest.”

Thus it will be seen to what extremity one of the most eminent jurist of our country was forced in order to give a correct, reasonable and legal effect to a fair contract of parties, and at the same time keep within a rule previously adopted as the settled policy of the courts of his native State.

This basis of reasoning being so manifestly a distinction without a difference, and the legal effect being to compel a party to pay annual interest upon unpaid installments of interest, although it was called damages instead of interest; that the legislature in 1866 enacted a law providing a rule governing such cases which would seem to be more in accord with the better principles and reason, and in terms enacted the rule adopted by the court below in this case: Section 1998, Revised Laws of Vermont.

Like reasoning characterizes many, if not most of the early cases cited by counsel for respondent. And the words of Pearson, C. J., in *Bledsoe v. Bixon*, 69 N. C., seem pertinent. After examining those cases and weighing the reason and logic used by the courts therein, the learned Chief Justice says: “ Interest is the price
“ agreed to be paid for the use of money; rent, is the price agreed
“ to be paid for the use of land; hire is the price agreed to be
“ paid for the use of a horse or other article of personal property;
“ call it interest, rent, or hire, it becomes a debt at the time the
“ party promised to pay it, and from that time he is using the
“ money of the creditor, or of the landlord, or of the bailor, and
“ ought to pay for the use of it, unless he be allowed to take advantage of his own wrong in not making payment at the day.
“ * * * The rule being, that when a certain sum of money is
“ to be paid at a specified time, on failure to pay, the party is to

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“ be charged with interest. * * * In our opinion the doctrine that when there is an agreement set out in the note for the payment of interest annually, or semi-annually, the maker is chargeable with interest at the like rate upon each deferred payment of interest in like manner as if he had given a promissory note for the same amount, is sound on principle. By this mode of computation, compound interest is not given. But a middle course is taken between simple and compound interest; *in mediam viam tutissimus ibis*. By computing interest in this way effect is given to the stipulation to pay interest at fixed times; whereas if simple interest be computed no effect whatever is given to the stipulation in regard to interest, and the court assumes the power to expunge it as surplusage, although it is manifest that the parties intended it to have some effect.”

The principal of the rule adopted by the court below as enunciated by the learned court above quoted, will, upon careful examination, be found not to be seriously in conflict with the doctrine promulgated by the courts in most of the cases cited by counsel for appellant. The leading case cited by counsel, *Young v. Hill*, 67 N. Y., was an action upon an account stated. The annual interest upon one of the items of the account was computed and added to the principal sum each year, and such increased sum was then treated as a new principal, and interest computed thereon. This was done each year from 1817 down to 1870, and so reported each year by the intestate of defendants to the original plaintiff. Thus it was claimed to be an account stated, or an agreement to pay what was clearly compound interest when the original contract was for annual interest. A divided court reaffirm the doctrine of *Connecticut v. Jackson*, *ante*, and the courts of that State may be fairly said to be committed to that rule. But as has already appeared the interest computed on the notes in the case at bar, was not compounded, but figured at simple interest from the time they

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became due; and with this in mind the language used by the learned Judge, who spoke for a majority of the court, becomes significant—at least in distinguishing the case at bar from *Connecticut v. Jackson*. Allen, Judge, says: “An agreement to pay
“ simple interest upon the several installments of interest as they
“ become due, and a computation based upon such agreement applying the payments as made, first to the payment of interest
“ until all was paid, might not be unreasonable or inequitable.
“ The result would have been far different from that insisted on.” The identical “agreement” above referred to, we find in the contract in the case at bar, and the method of computation which would distinguish a case from the one the learned Judge was then deciding, seems to have been just the method adopted by the court below.

Again, the case of *Leonard v. Villars*, cited by appellant’s counsel, is another case of compounding the interest where no provision for the payment of interest upon interest appears in the contract. Perhaps no case to which our attention has been called is more exhaustive of this whole subject of interest than the case of *Union Institution for Savings v. City of Boston*, cited by appellant’s counsel; and as many of the authorities cited upon brief of counsel are not accessible to us, we desire to call attention to the discussion of this subject by the various courts as appears in a very exhaustive opinion delivered by Gray, Chief Justice, in that case.

“In *Price v. Great Western Railway*, 16 M. & W., Baron Parke said that the reason why, under a mortgage deed, where
“ by interest is payable up to a certain day, interest beyond that
“ day might be recovered as damages, was because the deed shows
“ the intention of the parties that it should be a debt bearing interest; and added: ‘The jury give it as damages for the detention of the debt.’”

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This seems to have been the leading case which controlled and guided the earlier decisions in this country, as appears from those above cited. Again: "In *Morgan v. Jones*, 5 Exch., 620, the owners of a vessel mortgaged it as security for a debt, with a proviso for redemption on payment of the principal and interest at the rate of ten per cent. in six months, but without any provision for payment of interest after that time. The principal not being paid then, it was held by Chief Baron Pollock and Barons Parke, Platt and Martin, that the mortgagee was entitled to interest at the same rate until payment; and Baron Parke said: "It was a sale of a chattel, redeemable on a certain day; then, if the mortgagors do not avail themselves of that provision, the same rate of interest continues payable."

It will be observed the decision in this case, as well as the others to be considered presently, are founded upon and construe contracts which contain no provision except the general one to pay interest annually; and this is distinguishable from the case at bar, which expressly provides in addition to the general agreement for interest annually, that should any of the interest not be paid when due, it shall bear interest at the rate of twelve per cent. per annum. And all attempts to arrive at the intention of the parties in the cases cited are made without the aid of the clear expression of the intention as manifested by the parties in the case at bar.

Again, in "*Keene v. Keene*, 3 C. B., (N. S.) 144, an action by an indorsee against the drawer of a bill of exchange for 200 pounds, payable in twelve months, with interest at the rate of ten per cent. per annum, was referred to a master, who allowed ten per cent. after, as well as before, the maturity of the bill."

This was alleged as an error. Mr. Justice Willes said: "Until the maturity of the bill, the interest is a debt; after its maturity, the interest is given as damages at the discretion of the jury."

* * * Chief Justice Cockburn said: "I see no ground for

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“referring this case back to the master as prayed. He has, as he well might, given in the shape of damages the rate of interest the parties themselves had contracted for. I think he has done quite right.” Mr. Justice Crowder said: “I am of the same opinion. The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as to the value of the money.” And Mr. Justice Williams concurred.

Again: “In a later case, Lord Justice Amphlett considered it to be clearly established by the previous decisions, that in the case of a mercantile security it is to be supposed that the parties intended interest to run on at the old rate if the money was not paid at the date; and, so in the redemption of mortgages, although the day for payment has passed, and there is no provision with the creditor for payment of interest after that day, the court will assume that interest is payable after the day at the same rate as before; and that, although what has to be paid may technically be called damages, they are damages of a peculiar kind, for it would not be left to a jury to regulate the amount; but the jury would be directed, as a matter of law, to find damages of the same amount as the interest which would have been payable if the promise had extended over the period: *Gordillo v. Wegeulin*, 5 Ch. D., 287, 303.”

Again, the learned Chief Justice Gray continues: “In *Bran-non v. Hursell*, 112 Mass., 63, it was held in an action on a promissory note, payable in four months, with interest at ten per cent., that interest shall be computed at that rate, not merely to the maturity of the note, but to the time of verdict; and the language of the court in that case, ‘that the plaintiff recover interest both before and after the note matures by virtue of the contract as incident or part of the debt,’ might well be modified

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“to say that the interest after breach of the contract, though not strictly recoverable as part of a debt but rather as damages, and ordinarily to be measured according to the intention manifested by the contract, by the standard thereby established.”

“Before the decision in *Brannon v. Hursell*,” the learned Judge continues, “the rule there declared had been established in Indiana, California, Texas, New Jersey, Illinois, Wisconsin, Iowa, Nevada and Tennessee. It has since been affirmed by decisions of the highest courts of Ohio, Michigan and Virginia. In Connecticut, the law seems formerly to have been considered as settled in accordance with these decisions; and, although some recent dicta have a tendency to explain away the grounds assigned in the earlier judgments, there is no adjudication to the contrary. The earlier decisions in New York support the same rule, both as to mortgages and as to ordinary debts. But in the light of later cases the question may, perhaps, be considered an open one in that State.”

Continuing, the learned Judge says: “Two observations may be made on the judgments which are opposed to the decision in *Brannon v. Hursell*. 1st: They admit that the intent of the parties, if expressed with sufficient clearness in their contract, will govern the rate of interest to the time of judgment: *Brewster v. Wakefield, supra*; *Pearce v. Hennessy*, 10 R. I., 227; *Capen v. Crowell*, 66 Maine, 282; *Paine v. Caswell*, 68 Maine, 80; *Gray v. Briscoe*, 6 Bush., 687; *Young v. Thompson*, 2 Kan., 83.” * * * * *

“We are constrained, with great respect for those who take a different view of the subject, to say that the rule established by the adjudication in *Brannon v. Hursell*, appears to us to best accord with the apparent intention of the parties, with the usage and understanding of men of business, with the weight of legal

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“reasoning and authority, and with the principles of equity that govern the enforcement and redemption mortgages.”

The case of *Brewster v. Wakefield*, 22 How., 118, was an appeal from the Supreme Court of the Territory of Minnesota, and came before the Supreme Court of the United States before the admission of Minnesota into the Union as a State. The notes in question in that suit were given by Brewster, whereby and in one of them, he promised to pay, twelve months after date thereof, to the order of Wakefield, the sum of \$5,585, with interest thereon at the rate of 20 per cent. per annum from the date thereof; another note for \$2,000, payable in twelve months, with interest at the rate of two per cent. per month from date; another note of \$1,000, with interest at the rate of two per cent. per month. Appellant, by his counsel, objected to the allowance of more than the legal rate of interest, seven per cent., after the notes became due and payable. Wakefield, on the contrary, claimed the interest should be allowed at the rate mentioned in the notes up to the time of judgment. The territorial court rendered judgment in accordance with the claim made by Wakefield. The case passed to the supreme territorial court, and finally to the Supreme Court of the United States. The statute of the territory governing this subject, section 1, was as follows:

“Any rate of interest agreed upon by the parties in the contract, specifying the same in writing, shall be legal and valid.”

Sec. 2. “When no rate of interest is agreed upon or specified in a note or other contract, seven per cent. per annum shall be the legal rate.”

It will be observed that there is no stipulation in relation to interest after the notes became due in case the debtor should fail to pay them, in that case; and Mr. Chief Justice Taney, in delivering the opinion of the court, says: “If the right of interest de-

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“pended altogether on contract, and was not given by the law in
“a case of this kind, the appellee would be entitled to no interest
“whatever after the day of payment. The creditor is entitled to
“interest after that time by operation of law and not by any pro-
“vision in the contract; and in this view of the subject we think
“the territorial courts committed an error in allowing after the
“notes fell due a higher rate of interest than that established by
“law where there was no contract to regulate it. Nor is there
“anything in the character of this contract that should induce the
“court by supposed intendment of the parties or doubtful infer-
“ences to extend the stipulation for interest beyond the time
“specified by the written contract. The law of Minnesota has
“fixed seven per cent. per annum as a reasonable and fair com-
“pensation for the use of money, and where a party desires to ex-
“tort from the necessities of the borrower more than three times
“as much as the legislature deems reasonable and just, he must
“take care that the contract is so written in plain and unambig-
“uous terms.”

The contract in the above case was evidently considered by the court as unconscionable, unjust, unfair and extortionate; no other view could reasonably be taken by the court of such a contract relating to interest so largely in excess of the legal rate as established by the laws of Minnesota as being a fair and just compensation for the use of money. Upon this ground and for these reasons any court would be justified in such a conclusion; and this clearly distinguishes the case of *Brewster v. Wakefield* from the case at bar. No speculation is required by this court to ascertain the meaning of the parties to this contract, for it is clearly set forth by the contract itself. The character of the contract is not open to criticism as was the one in the case last above quoted, because the laws of the territory expressly provide that the sum herein contracted to be paid is a just and lawful compensation for

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the use of money. Again in 1877 the Supreme Court of the United States in passing upon this identical question in *Cromwell v. County of Sac*, 96 U. S., page 61, had occasion to refer to the case of *Brewster v. Wakfield*, and used this pertinent language:

“That case came from a territorial court and arose under a statute which allowed parties to agree upon any rate of interest however exorbitant, and only prescribed seven per cent. in the absence of such an agreement; this court, bound by no adjudication of the territorial court, and looking with disfavor upon the devouring character of the interests stipulated in that case, gave a strict construction to the contract of the parties.”

And again speaking of the case then before them, Mr. Justice Field says: “By the settled law of Iowa as established by repeated decisions of her highest court, contracts drawing a specified rate of interest before maturity draw the same rate of interest afterwards. There are, however, conflicting decisions, but the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment. The statutory rate of six per cent. in Iowa only applies in the absence of a different stipulated rate. As the judgment in the case of a stipulated interest in the contract must bear the same rate, it could not have been intended that a different rate should be allowed between the maturity of the contract and the entry of judgment.”

It will be observed the provisions of the statute of this territory upon this subject are almost identical with those above quoted from the statute of Iowa, and in that case the court was called upon to ascertain the intention of the parties to a contract with reference to the rate of interest which the contract must bear by *intendment*, while in the case at bar the intention is expressed;

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and in that case interest upon interest was disallowed, because, as the learned Judge says, "that can be allowed only at the rate of six per cent. under the law of Iowa," and upon this point the law of Dakota seems to be different. Section 1102, Civil Code, provides: "Any legal rate of interest stipulated by a contract, remains chargeable after a breach thereof as before, until the contract is superseded by a verdict or other new obligation."

What was the interest stipulated by the contract in the case at bar? Twelve per cent. per annum, payable annually, and if any force whatever is to be given to the section of our code above quoted, it is difficult to conceive by what theory or basis of reasoning a different rate can be computed than a twelve per cent. rate, payable annually.

The latest consideration of this question by the Supreme Court of the United States, which I have been able to discover, is the case of *Holden v. The Trust Co.*, 100 U. S., 72. That case went up from the District of Columbia. The contract was for the payment of \$5,000, payable four years from date at the Bank of Washington, with interest at the rate of ten per cent., payable semi-annually. The rate of interest in the District of Columbia was six per cent. per annum upon all moneys due where there is no contract upon the subject. *Second*—parties may stipulate in writing for ten per cent. per annum or any less rate. *Third*—if more than ten per cent. is taken upon any contract, all the interest taken may be recovered back if sued for within a year. The court say: "The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate:" Citing *Brewster v. Wakefield*, 22 Howard, 118; *Burnhisel v. Firman*, 22 Wall., 170.

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“Where a different rule has been established, it governs, of course, in that locality. The question is always one of local law. Here the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to everything beyond that, it is silent. If the payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intendment cannot be inferred.”

The ruling, as well as the language of the court in the above case, is significant. The rule, the court there say, “Has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate.”

No mistake can be made in considering the contract in question; the parties themselves have not left it for the court to presume or find by intendment what was to be the contract rate after the principal sum became due. Again the court say: “Here the agreement of the parties extends no further than to the time fixed for the payment of the principal.” Quite the reverse is the case before us. The contract here specifies in plain and unequivocal terms as to the intention of the parties beyond the time when the contract became due. Again the court say: “Where none has been agreed upon the law fixes the amount according to the standard applied in all such cases.” In the case at bar the agreement is explicit. Again the court say: “It is the legal rate of interest where the parties have agreed upon none.” The contract in the case at bar provides for a legal rate by express agreement of the

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parties after as well as before the contract became due. Again the court say: "If the parties meant that the contract rate should continue, it would have been easy to say so." The case at bar exemplifies the truthfulness of the language of the learned Justice Swayne upon this point. They recognize the ease with which their understanding and agreement could be impeached in the contract and govern themselves accordingly, leaving for this court no question of possible intendment, no doubt or uncertainty as to what the agreement of the respondent was at the time this contract was made, not only with reference to the interest accruing before the maturity of the note, but all that might accrue subsequently as well, only imposing upon us the burden of judicial sanction upon a contract plain and unequivocal in terms, and as plainly and unequivocally authorized by statute.

All of the cases above cited have turned, as they necessarily must upon the term of the particular contract under consideration, in view of and in the light of the statute of the States governing them, and in none of them has the attempt been made to change, alter or modify the express terms of the contract, and only in cases where the contracting parties have broken away from the limits prescribed by law, and entered into agreements which the courts have had no difficulty in finding were unconscionable, unjust and extortionate, have the courts attempted in the least to modify by judicial sanction the expressed will of the parties.

If the intention of the parties to this contract was uncertain, either as respects the rate of interest before or after maturity of the note in question, the case of *Spencer v. Maxfield*, 16 Wisconsin, 185, might be of greater value than it now is in determining the question of the intendment of parties in contracts of this character. That was a foreclosure of a mortgage given to secure a promissory note, which was as follows: "\$800. For value received, I promise to pay Clayton Lemans or bearer, eight hun-

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“dred dollars, three years from the fifteenth day of April, 1857,
“with the interest at 12 per cent. after the first day of June, 1857.
“This note running with mortgage of same date.

(Signed.) “J. H. WYCKOFF.”

Nothing was said in the note or mortgage concerning the interest accruing subsequent to maturity of the note. The court below computed the interest at 12 per cent. before and after maturity alike, applying, as was done in this case, certain payments upon interest already accrued. The learned Judge, in speaking for the court in that decision, says: “It is claimed that the contract is silent as to interest after maturity, and that it is controlled by the law which regulates the rate of interest when none is agreed upon by the parties. It appears to us that this is not the proper interpretation of the contract. The statute in force at the time the note was executed, permitted parties to contract for any rate of interest not exceeding twelve per cent. per annum: Ch. 192, Laws of 1851. And we have no doubt but the general understanding among business men has been, that notes in the form of the one under consideration draw interest at the rate of twelve per cent. after as well as before maturity. Such, we believe, to be the construction placed upon these contracts by the community, and we think it is the correct one. And therefore we have no hesitation in saying, where the parties have confined themselves to the rate per cent. allowed to be contracted for, that the presumption is that they agreed and understood that the interest should be charged on the debt after maturity, the same as before. This, we think, is the implied agreement or understanding of the parties to the contract.” * * *

“This, we think, is the ordinary presumption arising from such contracts. It seems hardly consistent with reason to say, that

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“ when parties have contracted for a higher rate of interest than
“ the law allows, in the absence of all special stipulations upon the
“ subject, that they intended that this rate should continue only
“ until the debt becomes due. but that after default the general
“ statute should apply and reduce that rate. This is not a fair or
“ rational construction of such transactions. We are aware that
“ the case of *Brewster v. Wakefield*, 22 How. U. S., 118, so holds.
“ But what influence the most unconscionable rate of interest
“ charged on the loans in that case had, in leading the court to
“ give the contracts a strict construction, it is impossible to say.
“ The Chief Justice says that there is nothing in the character of
“ the contract that should induce the court, by supposed intend-
“ ment of the parties or doubtful inferences, to extend the stipu-
“ lation for interest beyond the time specified in the written con-
“ tract. But in this case the rate of interest is not unconscionable
“ or severe, and is one very frequently contracted for in making
“ loans.”

To the same effect is a very recent decision rendered by the
Supreme Court of Indiana: *Shaw v. Rigby*, 84 Ind., 375.

It will be observed that in nearly every instance the courts in
the above cases were called upon to construe and give effect to
contracts providing only for the payment of “annual interest.”
If these courts of high authority reach such conclusions from a
consideration of contracts of that character, there seems to be little
occasion in the light of reason or precedent to misunderstand or
misconstrue the contract in question, providing in terms that any
interest not paid when due, should bear interest at the rate of
twelve per cent. per annum.

It will not do in the light of section 1102, of the Civil Code,
ante, to say that such rate is unconscionable or inequitable. This
court will not attempt to usurp the functions of the legislative,

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branch of the government, neither will it be well to attempt to modify or abridge the meaning of a written contract, if the parties making the same had the clear legal right to execute it, and did so in unmistakable terms. And while it might be in the line of many high authorities to hold as in one of the cases above cited, that the interest upon the unpaid installments of interest may be treated as separate causes of action and allowed as damages in the main action, yet in view of the express provisions of this contract, it seems a more consistent course to give the force and effect to the written instrument which the parties clearly intended for it.

The objection made by the appellant's counsel, that the computation was unjust and inequitable, is sufficiently answered by reference to the contract, and the debtor could easily have avoided any injustice in this direction by complying with its terms, and paying the debt as agreed.

Entertaining the view then, that the clear unequivocal intention of the parties to this contract was to provide for the payment of interest upon the installments of interest which should be unpaid and withheld by the appellant, we find no error in the method of computation adopted by the court below on the unpaid installments of interest which accrued previous to the time of maturity of the principal sum. After the debt became due by the terms of the contract, then the principal and interest were due at all times till payment; but unpaid interest accruing after maturity, would not be subject to the annual rest rule which obtained before the maturity of the notes. The sum tendered by the appellant not being sufficient in amount to cover the principal and interest then due, was insufficient for any purpose, and therefore in accordance with the law laid down by this court in *Farmers National Bank of Salem v. Rasmussen*, 1 Dak., 60, the respondent was entitled to the attorney's fees when suit commenced as allowed by the

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court below. The plaintiff below seasonably moved and was allowed by the court to amend his complaint to meet the evidence. The nature of the amendment as appears from the record, was clearly permissible under section 142, C. C. P., of this territory.

The only remaining question presented by the record, appears by the tenth finding of fact by the court below as appears, *ante*. It seems that about the 6th day of March, 1881, and about the time the principal of the note had fallen due, and before any part of the interest upon the principal sum had been paid, the appellant and respondent agreed upon an extension of the time of payment of the note, upon the appellant's agreement to pay the rate of ten per cent. interest for that year. This extension of time and reduction of rate was effected by correspondence, but the court found such agreement existed, but that no interest was ever paid under it, and that nothing has ever been paid as interest on the notes that has accrued since said contract was entered into.

This action was instituted in 1883, and in computing the interest upon the notes in question the court below, regardless of the ten per cent. contract, allowed the interest at the rate provided in the notes for the year ending March, 1882, the same as the preceding year. This is assigned as error.

It will be observed that the agreement entered into between the parties effecting a reduction in the rate of the interest for one year was made about the time the debt became due, by the terms of the original contract. No new evidence of debt was executed at that time, and the manifest intention of the parties seems to have been not only to allow the old contract to remain, but to expressly treat it as the basis of indebtedness to which the agreement of March, 1881, related.

In fact nothing in conflict with this idea appears by the record in this case. The stipulations of the note therefore being in no

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sense annulled, but only suspended, what were the rights of the parties to the contract under the ten per cent. agreement? Can it be said the respondent was bound by the terms of that subsequent contract without any corresponding liability on the part of the appellant to perform his part of it? It was an agreement affecting the rate of interest for one year upon the notes in question. The principal of the notes was then due. No arrangement seems to have been made concerning the payment of the principal sum; it was left for payment at the end of the second year, or a subject for further stipulation or agreement for its continuance.

The advantage to be gained by the appellant under the agreement of reduction was open to him by his keeping his part of the contract and paying the interest at the reduced rate at the end of the year when it became due. This he failed to do. No further contract concerning the principal sum or subsequent interest was entered into between the parties; the original evidence of indebtedness was allowed to remain; the original contract and evidence of debt was left therefore in full force and is the subject of this action. The benefits accruing to the appellant by virtue of the agreement to reduce the interest, were lost to him by his failure to meet the terms of that agreement at the time specified. Sufficient appears from the record in the case to satisfy us not only that the expectations of the parties were, that if the reduction was made the interest should be paid at the end of the year, but the clear intention of the parties seems to have been rather that the reduced rate was only to be considered and held operative and of binding force between the parties only upon the payment of the interest at the agreed rate of ten per cent. at the time when, by the terms of the agreement, said interest should become due; and not that it was the understanding or agreement that the indebtedness should continue at the reduced rate, whether or not the interest was paid when it became due.

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We conclude, therefore, that the appellant having failed to perform on his part the terms of the agreement of March, 1881, by paying his interest at ten per cent. and compelling the respondent to institute these proceedings upon the original contract, he has forfeited all his rights under and by virtue of that agreement, and should be bound by the terms of the original contract, which is the basis of this action.

Judgment is therefore remanded, with instruction to the District Court that the judgment be modified in accordance with the views above expressed.

FRANCIS, J.—I concur in so much of the opinion filed in this case as allows simple interest upon the unpaid installments of interest which accrued annually, up to the maturity of the principal sum, and straight interest after said maturity (without annual rests) at twelve per cent., the rate fixed in the contract, upon the aggregate sum made up of said accrued interest, and said interest thereon, and said principal sum, until paid.

I do not concur in the disposition of the question respecting the allowance of attorney's fees, as that question was left for future argument, and was not discussed in the argument before this court, and is of so much importance to attorneys and litigants, in this territory, that it should not be passed upon or decided without a full argument upon it.

CHURCH, J., *dissenting*.—I agree that the plaintiff is entitled to interest upon such installments of interest as fell due at and before the final maturity of the contract, and upon the principal from maturity, all at the rate provided for by the contract, which in the

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first instance was twelve per cent. To this extent I concur with the other members of the court.

When the contract matured the whole became due and no further annual rests should be allowed. This, I think, is the better rule, and is amply sustained by authority.

The plaintiff, however, in his complaint alleged, that on "March 6, 1881, it was mutually agreed that the principal sum in said note should from said date for one year bear interest at the rate of ten per cent. per annum, instead of twelve per cent;" also that the principal "became due May (March) 6, 1882."

The court found this agreement as a fact, "and that defendants should have the use of it (the principal) one year from said 6th of March, 1881, at said rate of interest."

The evidence on this point, as derived from the plaintiff, shows that on February 1, 1881, (having previously been written to by defendants to know what would be the lowest rate he would take if they continued the loan), he wrote the defendants as follows: "I wish you to answer this at once and say what interest you * * * are willing to allow me another year after March 6, and longer, if you want. I do not care for the money. I will reduce the interest some from what it has been for the last two years."

And again, March 2, 1881, acknowledging receipt of defendants' letter of February 28: "I accept your offer on the note * * * and have made a minute of it on note, as suggested, at ten per cent. after March 6, 1881."

I do not find the letter of February 28, in the record. The minute which plaintiff made on the note was in these words: "Interest 10 per cent. after May (March) 6, 1881, for one year."

It will be noticed that at the time this agreement was made, defendants were already in default upon the interest accrued.

Clearly this must be regarded as an extension of the note for one year, and I think effect must be given to it as such. No con-

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dition is in terms annexed to it, nor is any alleged. Its operation is to postpone the maturity of the note one year, and thus to give the plaintiff interest on an additional installment of interest. It was a waiver of the rights of both parties to avail themselves of the forfeiture clause in the note.

On the other hand, however, this agreement also operated to reduce the rate of interest on the whole amount due, principal and interest, to ten per cent. from its date, March 6, 1881.

I think the judgment should be modified in accordance with these views.



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2. LAUNCHING HULL: SUBSEQUENT CONSTRUCTION. The mere launching of the hull of an incomplete steamboat cannot give to a new builder, thereafter engaged in her construction, the lien of the maritime law. *Id.*
3. HOME PORT: WHAT IS. So far as the question of home port affects the rights and remedies of material-men, that port of the state or territory where the owner, or if more than one, where the managing owner resides, is to be deemed the home port of the vessel. *Id.*
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BURDEN OF PROOF:

1. **SELF DEFENSE: BURDEN OF PROOF.** Upon a trial for murder, the commission of the homicide by the defendant being proved, unless the evidence of the prosecution tends to show, that the killing amounts only to manslaughter or was excusable or justifiable, the burden is on the defendant to establish self defense—not beyond a reasonable doubt, but by a preponderance of the evidence. *U. S. v. Crow Dog*, 106.
2. **AFFIRMATIVE DEFENSE: REASONABLE DOUBT.** When the burden of proof is on the defendant to establish such affirmative defense, it is not sufficient to warrant an acquittal, for him to raise a reasonable doubt as to whether the killing was justifiable, or excusable. *Id.*
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SEE REASONABLE DOUBT, 1.

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1. TERRITORIAL LEGISLATURE: LEGISLATIVE POWERS OF: IN WHAT SENSE DELEGATED. The investiture of the territorial legislature with legislative powers, is to be regarded as a delegation of authority in the same general sense only in which the powers of Congress are considered to be delegated by the people. And such powers are, within their proper scope, to be exercised by the territorial legislature in the same manner as like powers may be exercised by other legislative bodies, state and national. *Territory ex rel. v. Scott et al*, 357.
2. RELOCATION OF CAPITAL: LEGISLATIVE POWER IN: HOW EXERCISED. That clause of section 12, of the Organic Act of this territory, which provides that the location of the territorial capital "shall thereafter be subject to be changed by the said governor and legislative assembly," is not to be regarded as either an enlargement or a limitation of the general legislative powers conferred upon the territorial legislature, but as a declaratory provision inserted by way of precaution. And whether considered as pertaining to the strictly law-making functions, or to those administrative functions belonging to every legislature, this power could be properly exercised in the form of a legislative act, as such functions are usually exercised by legislative bodies. *Id.*
3. SAME: LEGISLATIVE FUNCTIONS: CANNOT BE DELEGATED: ADMINISTRATIVE, MAY. Prescribing by law that a change of the location of the seat of government shall be made, and a new location selected, and the mode in which this shall be accomplished, would seem to pertain closely to the law-making function, which cannot be delegated. But the actual selection of a suitable location, and the erection of buildings and improvements thereon are clearly acts of an administrative character. *Id.*
4. LEGISLATIVE ACT VALID. The provisions of the act for the selection by commissioners of a suitable location for the seat of government, and for the erection thereon of the necessary buildings and improvements, are a lawful and proper exercise of legislative authority, and the act in question is valid and operative. *Id.*
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1. TO JUROR: ERROR WITHOUT PREJUDICE: PEREMPTORY CHALLENGE REMAINING. The ruling of the court sustaining a challenge to a juror for cause although not justified by the facts disclosed in his examination, is not error for which a judgment will be reversed when he might have been challenged peremptorily by the same party; and it not appearing that the defendant was prejudiced by such ruling, the cause having been tried by a competent jury. *Herbert v. Northern Pacific R. R. Co.*, 38.

CHANGE OF VENUE:

1. **APPLICATION FOR: SUFFICIENCY OF.** An affidavit for a change of venue must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had. The court must be satisfied from the facts sworn to, and not from the conclusions to, which defendant or his witnesses may depose. Affidavit held insufficient. *Territory v. Egan*, 119.

CHARGING JURY:

1. **SEMBLE: CHARGING THE JURY: DUTY OF THE COURT.** It is the duty of the court to charge the jury, whether requested or not, upon every point material to the decision of the case, upon which there is evidence, and to charge correctly and fully. *Moline Plow Co. v. Gilbert*, 239.

SEE INSTRUCTIONS, 1.

CHATTEL MORTGAGE—SEE CONVERSION, 1.**CIRCUMSTANTIAL EVIDENCE—SEE EVIDENCE, 9.****CLAIM AND DELIVERY:**

1. **DEMAND BEFORE SUIT: WHEN UNNECESSARY.** Where the plaintiff's right to recover is contested by the defendant upon a claim of superior right, the defendant cannot set up a want of demand as a reason for his failure to surrender the property in controversy. Defendant therefore cannot claim ownership, and still defeat the plaintiff's action for want of a demand. *Myrick v. Bill*, 284.

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1. **DECLARATIONS OF DEFENDANT: THREATS OF ARREST.** Declarations made by defendant, not amounting to a confession or denial of his guilt, but from which, when taken in connection with surrounding circumstances, an inference of guilt might be drawn; such declarations being made in excitement and fear of arrest, and after threats of arrest, simply, no other threats being made and no inducements held out—held, clearly admissible in evidence. *Territory v. Egan*, 119.

CONFLICT OF EVIDENCE—SEE FINDINGS OF FACT, 3.**CONTRACT:**

1. **CORRESPONDENCE: PURCHASE AND SALE.** On July 5th, P. wrote to T.: "What is Cole's scrip worth, and soldiers' additional homesteads, now?" On July 8th, T. replied: "Have to advise that I can furnish to-day Cole's scrip at \$5, and additional 80's at \$3 per acre." On July 12th,

P. telegraphed: "Send me 2 soldiers' additional eighties to-day"—*held*, not a contract for a sale at \$3 per acre. *Talbot v. Pettigrew*, 141.

2. **MORTGAGED PROPERTY: DESCRIPTION OF: CAPABLE OF IDENTIFICATION: NOT UNCERTAIN.** In a mortgage executed upon property in the possession of the mortgagor, a part being described as "an undivided two-thirds interest, same being entire interest of said Wm. H. Wheeler in and to sixty acres of wheat now in and growing on the northeast $\frac{1}{4}$ of section 32, in township 141, north of 5th P. M."—*held*, not uncertain and indefinite; that the property could be identified by inquiry. *Nichols, Shepard & Co. v. Barnes*, 148.

EXEMPTION FROM TAXATION SEE TAXATION, 1; **GUARANTOR, 1; INTEREST, 1.**

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1. **QUESTION FOR JURY.** The question of contributory negligence of the plaintiff which would prevent a recovery in an action for damages against a railroad company, is generally a question of fact to be submitted to a jury under proper instructions, and when it is so submitted the verdict of the jury is conclusive on that point; hence a refusal to charge the jury, that certain acts of the plaintiff at the time the accident occurred constituted negligence and prevented a recovery, was not error. *Herbert v. Northern Pacific R. R. Co.*, 38.
2. ———. If the plaintiff, by any act, contributed to, or caused the accident complained of, the defendant would not be liable for damages. *Larson v. Grand Forks*, 307.
3. **FOR THE JURY, WHEN.** The question of contributory negligence, is for the jury, when the evidence is conflicting; or when the facts are undisputed, if different minds might draw different conclusions from them. *Mares v. Northern Pacific R. R. Co.*, 336.
4. **WHEN IT MAY BECOME A QUESTION FOR THE COURT.** But when the facts are undisputed, or conclusively proved, and there is no reasonable chance for fair minded men to draw different conclusions from them, and there can be but one conclusion, the question of negligence becomes one for the court. *Id.*

CORPORATION, DE FACTO—SEE EVIDENCE, 10.

CONVERSION:

1. **RECORD CONSTRUCTIVE NOTICE: PURCHASER LIABLE FOR CONVERSION.** The wheat having been sold by the mortgagor to the defendants, who mixed it with other wheat and sold it in the ordinary course of business, the mortgage being on file in the proper office was constructive notice to defendants of plaintiffs' interest, and defendants were liable for conversion. *Nichols, Shepard & Co. v. Barnes*, 150.

COUNTER CLAIM:

1. **REPLY: WHEN NECESSARY.** By the Code of Civil Procedure of this territory, when the answer contains new matter constituting a counter

claim, a reply is necessary to put in issue such new matter. But unless the new matter set up in the answer constitutes a counter claim, no reply is necessary, unless ordered by the court. *Star Wagon Co. v. Matthiessen*, 233.

SEE USURY, 2.

COUNTY TREASURER:

1. COUNTY TREASURER: NOT ENTITLED TO COMMISSION ON BONDS. A county treasurer is not entitled to commissions upon the proceeds of county bonds brought into the treasury without his instrumentality. *Territory ex rel v. Cavanaugh*, 325.

CREDIBILITY OF WITNESS:

1. INSTRUCTIONS TO JURY AS TO. The jury in testing the credibility of a witness are to take into consideration the facts, circumstances and surroundings of the case, and whether he has been corroborated by other witnesses; and are not to discredit a witness from mere wanton opinion that he is to be disbelieved, or a mere imaginary idea of his want of credit; and when so qualified, an instruction that "under any and all circumstances a witness's character may be tested by the party against whom that witness is brought, by proof of his general character for truth and veracity in the community where the witness resides"—*held*, not erroneous. *Territory v. Egan*, 119.
2. SAME. An instruction to the jury in these words, "I don't say to you that you are bound to believe a witness who testifies to a material fact that is wholly uncontradicted, but there is nothing that requires you to discredit a witness who testifies to a material fact uncontradicted, and especially if another witness testifies to the same fact"—*held*, not erroneous. *Id.*

CRIMINAL PROCEDURE—SEE EVIDENCE, 3, 4, 5.

DAMAGES:

1. AMOUNT OF. There being no valid objection to the charge of the court on the question of damages, the amount of the recovery was entirely with the jury, particularly in this case where exemplary damages may have been given. *Bates v. Callender*, 256.
2. EXEMPLARY: NOT RECOVERABLE IN ACTION AGAINST CITY. In an action for personal injuries sustained by reason of negligence on the part of the city to keep its streets in a reasonably safe condition, only actual damages are recoverable. Exemplary or vindictive damages are not allowed. *Larson v. Grand Forks*, 307.
3. INJURY TO FEELINGS: MUST ACCOMPANY CORPORAL OR PERSONAL INJURY. No damages can be recovered for a shock and outrage to the feelings and sensibilities, or for mental distress and anguish, caused by a breach of a contract, (except a marriage contract.) Such damages can only enter into and become a part of the recovery in an action for a tort when the plaintiff has sustained some corporal or personal injury. No actual

damages having been claimed in the complaint, it does not state a cause of action. *Russell v. W. U. Tel. Co.*, 315.

SEE CONTRIBUTORY NEGLIGENCE, 1; VERDICT, 8; MUNICIPAL CORPORATION, 1 2.

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ERROR, WITHOUT PREJUDICE—SEE FINDINGS OF FACT, 1, 2, 3; EVIDENCE, 12, 13.

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1. AVERMENTS AND ADMISSIONS IN PLEADINGS: ESTOPPEL BY. A defendant is not at liberty to raise an issue which he has closed by admissions or averments in his answer, nor can one who explicitly admits or avers by his pleading that which establishes plaintiff's rights, be permitted to deny the existence of the fact so admitted or averred, or to prove any state of facts inconsistent therewith. *Myrick v. Bill*, 284.

SEE WARRANTY, 1.

EQUITY—SEE PRACTICE, 2.

EVIDENCE:

1. PREVIOUS THREATS. Previous threats alone, unaccompanied with any present hostile demonstration, either real or apparent, neither justify nor excuse nor mitigate a killing, neither does mere apprehension of future danger. *U. S. v. Leighton*, 29.
2. SAME. When, at the time of the killing, the deceased was making no demonstration whatever toward defendant, nor any person whom he had the right to defend, and defendant knew him to be unarmed, and the killing was with a deadly weapon, evidence of previous threats by deceased cannot be material for any purpose. *Id.*
3. WIFE INCOMPETENT AS A WITNESS. The statute of the United States permitting a defendant to testify in his own behalf, makes no provision for the wife testifying; and in the absence of a statute expressly allow-

- ing a wife to testify for her husband in a criminal case, she is not a competent witness. *U. S. v. Crow Dog*, 106.
4. **TERRITORIAL STATUTE: HAS NO APPLICATION.** The provisions of the Code of Criminal Procedure of this territory, making the wife a competent witness for her husband, have no application to the District Courts when exercising the jurisdiction in cases in which the United States is a party, under the laws of Congress. *Id.*
 5. **SAME.** These provisions of the Code of Criminal Procedure apply only to cases prosecuted in the name of the territory for violations of its laws, in the courts for counties and judicial subdivisions. *Id.*
 6. **EXPERT EVIDENCE: DIRECTION OF BLOWS: INSTRUMENT USED.** Testimony of a medical expert as to the direction from which blows were received, and the character of the instrument with which injuries were inflicted, is competent upon a trial for homicide. *Territory v. Egan*, 119.
 7. **EVIDENCE: DIAGRAMS OF PLACE.** Diagrams of the premises where a homicide occurred are admissible in evidence after the proper foundation has been laid by showing their accuracy and the skill of the person who prepared them. *Id.*
 8. **SAME: BLOODY INSTRUMENT FOUND NEAR SCENE OF HOMICIDE.** It having been shown that wounds upon deceased may have been produced by a blunt instrument, and that a bloody, wooden picket-pin was found near the scene of the homicide, and shortly thereafter, with human hairs adhering thereto of a length and color corresponding with that of deceased—*held*, that such instrument might properly be exhibited to the jury in evidence. *Id.*
 9. **CIRCUMSTANTIAL EVIDENCE.** There is no ground for distinction between circumstantial and direct evidence. The evidence of circumstances is to be taken the same as evidence of direct and positive acts; and considering the whole instructions on this point, and the facts involved, it was held proper to so instruct the jury. *Id.*
 10. **CORPORATION: SUFFICIENT TO SHOW DE-FACTO EXISTENCE OF.** Evidence of the acts of the plaintiff as a corporation in good faith, and the expenditure of many thousands of dollars in the conduct of its business in this territory, together with other facts—*held*, sufficient to establish its *de-facto* existence, no proofs being offered to the contrary. *Caledonia Gold Mining Co. v. Noonan*, 189.
 11. **IMPEACHING WITNESS: CROSS-EXAMINATION OF.** Where an impeaching witness, on his direct examination, testifies to a part of a conversation, it is error to exclude the rest of such conversation, when material to the case, upon cross-examination; particularly when the balance of such conversation tends to explain the apparently contradictory statements of the witness sought to be impeached. *U. S. v. Knowlton*, 58.
 12. **EVIDENCE: ADMITTING IMPROPER: NOT AFFECTING VERDICT: NOT GROUND FOR REVERSAL.** The admission of secondary evidence, without the proper foundation being laid therefor, is not ground for a new trial, when it clearly appears to this court that no injustice has been done, and the verdict would have been the same with or without such evidence. *Moline Plow Co. v. Gilbert*, 239.
 13. **SAME: WITNESS UNDERSTANDING: NOT COMPETENT EVIDENCE.** A witness cannot testify as to his understanding of the terms of a contract; and

the exclusion of such evidence is not error, even when the ground of the objection to the evidence is, that the answer is not responsive to the question asked. *Id.*

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1. **GENERAL EXCEPTION: WHEN UNAVAILING.** Where an objection to evidence could have been obviated upon the trial, if specifically pointed out, an exception which does not specifically point out such objection will be unavailing upon appeal. *Caledonia Gold Mining Co. v. Noonan, 189.*
2. **SAME: SECONDARY EVIDENCE.** The rule requires an objection to secondary evidence to be made specifically upon the ground, that it is not the best evidence; and the objection to the introduction of a written instrument in evidence, because its execution has not been proven, must be made upon that specific ground, to be of avail in a bill of exceptions. *Id.*
3. **SAME: WHEN SUFFICIENT.** If the objection goes to the merits, and cannot be obviated, then a general objection may suffice, because in such case the evidence cannot be made available to the party by any subsequent acts. *Id.*
4. **SAME: READING DEPOSITIONS: OBJECTIONS TO.** General objections and exceptions were taken to the reading in evidence of depositions. The specific objections - first, that it does not appear in the evidence that the witness was proven to have been out of the county; second, it does not appear that a notice of the taking was appended to the deposition, are taken for the first time in this court—*held*, that this court will not consider such general exceptions. *Id.*
5. **SAME: PRESUMPTION OF REGULARITY IN.** In the absence of it appearing affirmatively that no such proof was made, and that the reading of the deposition was objected to on that specific ground, this court will presume sufficient grounds were laid, and sufficient proof was made to authorize the reading of the depositions. *Id.*

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EXEMPTION, FROM TAXATION—SEE TAXATION, 1.

EXEMPTIONS:

1. **PARTNERSHIP: DISSOLUTION OF INSOLVENT: NOT CONSTRUCTIVE FRAUD; PARTNERS MAY CLAIM EXEMPTIONS.** The dissolution of an insolvent firm, and a division of its assets between the partners, accomplished without actual fraud, even though it be done for the purpose of securing to the

members of the firm the benefits of individual exemptions, is not a constructive fraud upon creditors, and will not deprive the partners of their right to individual exemptions out of former firm property. *Bates v. Callender*, 256.

2. EXEMPT PROPERTY: NOT CAPABLE OF FRAUDULENT ALIENATION. Within the terms and limit of an exemption law, any acquisition of property or exchange of property which is exempt, is lawful, and exempt property is not susceptible of fraudulent alienation or disposition. *Id.*
3. SAME: DUTY OF OFFICER: PROPERTY PRIMA FACIE SUBJECT TO LEVY. All property not absolutely exempt, is, under our law, *prima facie* subject to levy; but the debtor has no duty to perform, in the surrender of property upon legal process, or until actual levy, and notice of the levy as required by statute. *Id.*
4. SAME: APPRAISEMENT: DEBTOR NEED DO NOTHING. The debtor is not required to anticipate the levy, or do any act to extend it; hence it is held, that the refusal of an instruction that, "If the debtors kept back, detained or concealed their personal property, or any part thereof, so that it could not be appraised, then they are not entitled to the benefit of the exemption law," was not error. *Id.*
5. SAME: OBSTRUCTION OF LEVY. Query: Whether actual obstruction of the levy, or concealment of property to prevent a levy might operate as a selection by the debtor under the exemption law, not decided. *Id.*

EXPERT—SEE EVIDENCE, 67.

FALSE WRITING—SEE PERJURY, 1.

FEES—SEE COUNTY TREASURER, 1.

FINDINGS OF FACT:

1. IMMATERIAL FINDINGS: ERROR WITHOUT PREJUDICE. The cause being tried by the court, and evidence having been received and findings of fact made of matters occurring prior to February 28, 1877; the findings distinctly and clearly discriminating between acts done before and those done after said date; the evidence fully supporting the findings, and the findings fully authorizing the judgment in plaintiff's favor—held, that the defendants could in no wise be prejudiced by such immaterial evidence and findings. *Caledonia Gold Mining Co. v. Noonan*, 189.
2. SAME: Immaterial findings which are not the basis of the judgment, other sufficient findings appearing in the record, will not vitiate the judgment or cause its reversal; following the decision in *Golden Terra Mining Co. v. Smith*, 2 Dak., 377, and distinguishing the case of *French v. Lancaster*, 2 Dak., 276, the latter case having been tried by a jury. *Id.*
3. SUFFICIENCY OF EVIDENCE. It is the province of the District Court to weigh the evidence and determine its preponderance between the parties. If there is a substantial conflict in the evidence, and the material findings are supported by sufficient and substantial evidence, this court cannot say the District Court erred in its findings; and exceptions to the decision for insufficiency of the evidence to sustain it, are not well founded. *Id.*

SEE VERDICT, 4, 5.

FIXTURES:

1. **MAY BECOME PERSONAL PROPERTY, WHEN.** The parties concerned may, by agreement in due form, give to fixtures the legal character of realty or personalty at their option, and the law will respect and enforce their understanding, whenever the rights of third parties will not be prejudiced. *Myrick v. Bill, 284.*

FORECLOSURE:

1. **BY ADVERTISEMENT: ASSIGNEE MUST FIRST RECORD ASSIGNMENT.** The purchaser of a mortgage containing a power of sale cannot foreclose the same by advertisement under the statutes of this territory, without a written assignment of such mortgage has been first duly executed, acknowledged and recorded as provided by law. *Hickey v. Richards, 346.*

FORFEITURE—SEE LAND GRANT, 1, 2.**FORGERY:**

1. **SECTION 5479, U. S. REVISED STATUTES: FORGERY STATUTE.** Section 5479 of the Revised Statutes of the United States, is designed to punish the forgery of the instruments therein named. *U. S. v. Cameron, 132.*
2. **PRE-EMPTION: FINAL PROOF: MAKING FALSE AFFIDAVIT IN.** The making and publishing an affidavit upon final proof for a pre-emption claim before a U. S. land office, which affidavit is genuine as to its execution, but false as to the matters therein stated, is not a crime within the purview of this statute. *Id.*

FRAUDULENT SALE—SEE SALE, 1, 2.**GUARANTOR:**

1. **WHAT EXONERATES.** In an action on a contract of guaranty, it is not error to instruct the jury, that if the terms of the agreement, guaranteed by defendants, were altered in any respect without consent of the defendants, in the time of payment, or in the proportionate part payable in the first payment, or in the matter of interest, or if any alteration was made which impaired or suspended plaintiff's remedy against the principal, the defendants would be exonerated; but query, whether shortening the time of payment impairs or suspends the remedies or rights of the creditor against the principal. *Moline Plow Co. v. Gilbert, 239.*

HOME PORT—SEE ADMIRALTY, 3, 4, 5, 6, 7.**HOMESTEAD:**

1. **SOME ESTATE IN LAND ESSENTIAL TO.** To support a claim of homestead some estate in land is essential. There can be no homestead right in a building alone, apart from the land on which it stands. Hence the wife's signature is not necessary to the validity of a conveyance of buildings owned and occupied by grantor and his family, but situated

upon land in which the grantor had no interest or estate at the time of such conveyance. *Myrick v. Bill*, 284.

HOMICIDE:

1. **HOMICIDE: PRESUMPTION: MURDER.** The deliberate and willful killing of one human being by another, with a deadly weapon, with intent to kill—no other facts appearing—raises a presumption that the killing is murder. *U. S. v. Crow Dog*, 106.

SEE THREATS, 1, 2; JURISDICTION, 2; BURDEN OF PROOF, 1, 2; MALICE, 1; EVIDENCE, 1; INDIAN RESERVATION, 3.

IMMATERIAL FINDINGS—SEE FINDINGS OF FACT, 1, 2.

IMPEACHING WITNESS—SEE EVIDENCE, 3.

INDIAN COUNTRY:

1. ———. The term "Indian Country" includes such portions of the public domain as are expressly reserved for the use and occupation of the several bands and tribes of Indians; and which are not included within the jurisdiction of any state or territorial government. *United States v. Knowlton*, 58.

SEE JURISDICTION, 1; MINING CLAIM, 1.

INDIAN RESERVATION:

1. ———. The authority of the President to withdraw from sale a portion of the public domain, and set it apart for the use of the several tribes of Sioux Indians, as an addition to their existing treaty reservation, cannot be questioned. *United States v. Knowlton*, 58.
2. ———. Such executive order withdrew that portion of the public domain from the operation of the criminal laws of the territory; the trade and intercourse laws were thereby extended over such district of country, and it became Indian country within the meaning of the acts of Congress extending the crimes act to the Indian country. *Id.*
3. **EXECUTIVE ORDER: REVOCATION OF: EFFECT ON PENDING INDICTMENT.** The revocation of the executive order setting apart such portion of the public domain as an addition to the existing reservation, did not affect the jurisdiction of the court to try defendant, upon an indictment for a homicide, committed in such district of country, pending at the time of such revocation. *Id.*

SEE JUDICIAL COGNIZANCE, 1; JURISDICTION, 1; LAND GRANT, 2.

INDICTMENT:

1. **CAPTION: JURISDICTION: HELD,** that the caption of the indictment in this case, properly defines the jurisdiction in U. S. causes, conferred by the acts of Congress creating the District Courts of the territory; affirming "*U. S. v. Beebe*," 2 Dak., 292. *United States v. Spaulding*, 85.

INJURY—By Co-EMPLOYEE. SEE NEGLIGENCE, 1, 2.

INSTRUCTIONS TO JURY:

1. ASSUMING UNDISPUTED FACTS IN EVIDENCE: NOT ERROR. In an action against a common carrier to recover damages for negligence in failing to safely carry and deliver property, all the witnesses testifying to some loss, and the only conflict in the testimony being as to the amount of the loss—*held*, not error for the court to assume that there was some damage or loss, and to instruct the jury that the only question upon that part of the case was as to the amount of the loss sustained by plaintiffs, and this the jury were to find. *Bush v. N. P. R. R. Co.*, 444.

SEE CONTRIBUTORY NEGLIGENCE, 1; CHARGING JURY, 1.

INSURANCE:

1. POLICY: WAIVER OF CONDITION IN. Upon a policy of insurance in which one of the conditions was, that in case of default of payment of any note given for premium, the company should not be liable for any loss happening during the continuance of such default—*held*, there being a breach of such condition the company may waive the forfeiture either by express language or by acts from which an intention to waive may be inferred. *Smith v. St. P. F. & M. Ins. Co.*, 80.
2. WAIVER: WHAT AMOUNTS TO. If in any negotiations or transactions based upon the policy and relating thereto after forfeiture, under circumstances indicating to the company or its authorized agent, that the insured makes a claim under the policy, notwithstanding such default, and no reply is made to such claim indicating the intention of the company to take advantage of the forfeiture, and the insured afterwards incurs the trouble and expense of making proofs of loss—*held*, the forfeiture is thereby waived. *Id.*
3. SAME: ACCEPTANCE OF PREMIUM. Held further, that the acceptance of the cash premium by the general agent of an insurance company after default and notice of the loss, operates as a waiver of the forfeiture, and renders the company continuously liable on the policy as though the note given for cash premiums had been paid at maturity. *Id.*

INTEREST:

1. REDUCED RATE: AGREEMENT TO ACCEPT. Where it was the clear intention of the parties that an agreement to accept a reduced rate of interest should be held operative and binding upon the parties, only upon condition that the interest at the reduced rate was paid at the time when, by the terms of the agreement, the reduced rate was to be paid—*held*, the interest at the reduced rate of interest was enforced.

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having settled upon land in question, after the passage of the act, while it was Indian territory, near the line of the road, witnessing the construction of the track, had actual knowledge of the definite line of said road, he cannot now object that notice was not sooner given, by the filing of the plat of such definite line in the office of the Commissioner of the General Land Office, nor be regarded as a *bona fide* settler, or pre-emptor, in any sense. *Id.*

LAW AND FACT—SEE CONTRIBUTORY NEGLIGENCE, 1, 3, 4.

LEVY—OF EXECUTION:

1. OF ATTACHMENT: ACTUAL CONTROL OF GOODS: WHAT SUFFICIENT. To constitute a valid levy of an attachment upon personal property, the officer must take actual possession and must have actual control of the property with power of removal. Such control must be exercised, as if done without the writ would amount to trespass. *Powell v. McKechnie*, 319.

SEE EXEMPTIONS, 3, 4.

LEX FORI—SEE STATUTE OF LIMITATIONS, 1.

LIBEL.

1. PLEADING: WORDS NOT ACTIONABLE PER SE. A direct charge of perjury is actionable *per se*, but the words, "He made false affidavits in order to commence his case," or "the affidavit made by Mr. C. was false," are not actionable *per se*, nor can an action be maintained upon them merely by an innuendo that they purported or were intended to import perjury. There should be a colloquium of a judicial proceeding, and the nature of the proceeding and the matter to which the oath was taken, should appear to have been material to the proceeding and before an officer authorized to administer an oath. *Casselman v. Winship*, 292.

LIEN—MARITIME. SEE ADMIRALTY.

MALICE:

1. ———: Section 772 of the Penal Code of this territory may properly be applied as a definition of the element of malice in the crime of murder, and is not inconsistent with premeditated design necessary to constitute criminal intent. *Territory v. Egan*, 119.
2. PRIOR ILL TREATMENT: EVIDENCE OF. Evidence of threats, menaces and ill treatment during the life-time of deceased, is competent as tending to prove malice. *Id.*

MANDAMUS:

1. RELATOR: WHO MAY BE: NON-RESIDENT OF COUNTY. Under an act of the legislature submitting the question of a division of Custer county to the legal voters residing within the proposed boundaries of the new county of Fall River, upon an application by a relator, who was a resident of

Lawrence county, for a writ of mandamus to compel the canvassing board to recanvass the vote cast at such election—*held*, that such relator was not "beneficially interested," even though owning property in the proposed new county, and was not the proper party to apply for the writ. *Territory ex rel. v. Cole*, 301.

2. SAME: PUBLIC OFFICER MUST APPLY FOR WRIT, WHEN: WHEN PRIVATE CITIZEN MAY BE RELATOR. When public rights are to be subserved public officers must apply for the writ; but if a private individual make himself relator he must show some particular right or privilege of his own, independently of that which he holds with the public at large as a citizen. *Id.*
3. WILL NOT LIE, BEING REMEDY AT LAW: COUNTY TREASURER. Section 95, of chapter 28, of the Political Code, having provided for an action to recover all money in the hands of a county treasurer which he shall fail to pay over, the writ of mandamus cannot be invoked to compel such payment. *Territory ex rel. v. Cavanaugh*, 325.
4. TOWN-SITE ACT: DUTIES OF PROBATE JUDGE UNDER: NOT MINISTERIAL BUT JUDICIAL: MANDAMUS WILL NOT LIE. The duties of a judge of the probate court under the provisions of the town-site act of this territory (laws 1881, c. 135) are judicial and not ministerial in their character, and mandamus will not lie to review or reverse his decisions adverse to claimants, or to compel him to execute deeds to tracts of land occupied and claimed under said law, after he has rendered decisions upon such claims adverse to such claimants. *Territory ex rel. v. Nowlin*, 349.

MARITIME LIEN—SEE ADMIRALTY.

MASTER AND SERVANT—SEE NEGLIGENCE, 1, 2, 3, 4.

MERGER:

1. ———. The corporation mortgaged all its property, franchises, privileges and immunities, including the contract right of exemption from taxation; such mortgage was legally foreclosed, and all such property, franchises, privileges and immunities were bid in by the governor, and were by him transferred to the State of Minnesota; at the time of such purchase and transfer the lands in controversy had become a part of Dakota Territory; the state regranted such property, franchises, privileges and immunities to plaintiff; it being admitted by the pleadings that the State of Minnesota intended to hold and regrant without merger or extinguishment all the mortgaged property, franchises, privileges and immunities—*held*, that the right of immunity from taxation as to such lands was not merged, but was conveyed to and acquired by the plaintiff corporation. *Winona & St. P. R. R. Co. v. County of Deuel*, 1.

MINING CLAIM:

1. INDIAN COUNTRY: MINING CLAIMS: NO RIGHTS ACQUIRED. No rights could be acquired to any lands in the Black Hills prior to the 28th of February, 1877, by reason of the existence, until that time, of the Sioux Indian Reservation, covering that part of the territory; following the decisions of this court in *Uhlig v. Garrison*, 2 Dak., 71; *French v. Lancaster*, *id.*, 276. *Caledonia Gold Mining Co. v. Noonan*, 189.

2. **SAME: PARTY IN POSSESSION ON FEBRUARY 28, 1877: MIGHT ADOPT PRIOR ACTS OF LOCATION: AND DATE RIGHTS FROM THAT DAY.** A party in possession of a mining claim on the 28th day of February, 1877, with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, could, by manifesting his adoption of these facts, and subsequently causing a proper record to be made and performing the amount of labor, or making the improvements necessary to hold the claim, date his rights from that day; and such location and subsequent labor and improvements would give him the right to possession from that date. *Id.*

MORTGAGE—DESCRIPTION OF CHATTELS. SEE CONTRACT, 2; CONVERSION, 1; FORECLOSURE, 1; ATTORNEY'S FEE, 1.

MUNICIPAL CORPORATION:

1. **POWER TO KEEP SIDEWALKS CLEAR OF OBSTRUCTIONS AND ACCUMULATIONS: WHEN ACCOMPANIED BY THE NECESSARY MEANS, CREATES A DUTY.** The mayor and council of the city of Grand Forks have power "to provide for keeping sidewalks clear and clean from all obstruction and accumulation." This power conferred upon the city by the legislature, together with the necessary means for the proper execution of the power, carries with it the corresponding duty, to keep the streets in a reasonably safe condition, and if it neglect to do so the city will be liable for injuries happening by reason of its negligence. *Larson v. Grand Forks*, 307.
2. **SAME: THINGS OVERHANGING WALK: PORCH.** This duty is not confined to obstructions upon the walk alone, but also applies as well to every thing hanging over the walk, that may render travel unsafe. *Id.*
3. **NEGLIGENCE: DEGREE: LACK OF ORDINARY OR REASONABLE CARE.** The general rule is, that in reparation of its highways a municipal corporation is answerable in damages for a lack of ordinary or reasonable care, it being held to the same rule of diligence as private persons in the conduct of any business involving a like danger to others. *Id.*
4. **NOTICE OF DEFECT IN STREET OR SIDEWALK: WHEN INFERRED.** Notice will be inferred if the defect in the street or sidewalk has existed for a considerable length of time; or from the fact that the defect had existed so long as to render it notorious; and upon such evidence fairly submitted to the jury, the finding will not be disturbed. *Id.*

SEE DAMAGES, 2.

MURDER—SEE HOMICIDE, 1; BURDEN OF PROOF, 1, 2; MALICE, 1.

NEGLIGENCE:

1. **INJURY FROM NEGLIGENCE OF CO-EMPLOYEE: LIABILITY OF EMPLOYER.** An employer is not liable to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business, and performing services for the same general purposes; but to this rule there are well defined exceptions. *Harte v. N. P. R. R. Co.*, 33.
2. **SAME: EXCEPTIONS TO RULE.** One, and perhaps the most important of these exceptions, arises from the obligation of the master, whether a

natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. *Id.*

3. SAME: SERVANT RISKS ORDINARY DANGERS OF SUCH EMPLOYMENT. It is implied in the contract between the parties, that the servant risks the dangers which ordinarily attend, or are incident to, the business in which he voluntarily engages for compensation. But it is equally implied in the same contract, that the master shall supply the physical means and agencies for the conduct of his business; and in selecting such means, machinery and appliances, and in preserving and maintaining them in a suitable condition, he shall not be wanting in proper care. His negligence in that regard renders him liable to an employe who sustains damage in consequence of such neglect. Section 1130 and 1131 of the Civil Code is an enactment of the common law on that subject and does not change this rule. *Id.*
4. SAME: EMPLOYER MUST FURNISH SAFE MACHINERY AND IMPLEMENTS. The master is liable for his own neglect in failing to furnish proper and safe machinery or implements, and in failing to keep them in a safe and suitable condition for such use. These duties belong to the master, and he cannot rid himself of responsibility for not performing them by showing that he delegated the performance to another servant who neglected to follow his instructions. *Id.*
5. FACTS UNDISPUTED: QUESTION FOR JURY. Even though the facts are undisputed it is for the jury, and not for the judge, to determine whether proper care was exercised, or whether negligence appears, whenever upon the facts in evidence, different minds might honestly draw different conclusions from such evidence. *Williams v. N. P. R. R. Co.*, 168.
6. NEGLIGENCE OF OWNERS: HAZARDOUS PLACES: CARE REQUIRED. But where stock run at large in places extra hazardous, the owners are required to exercise an extra degree of care, and if a loss occurs which could have been prevented by the use of such care as the circumstances required, the R. R. Company is not liable, unless the injury was occasioned by wanton or reckless misconduct of defendant or its employes. *Id.*

SEE MUNICIPAL CORPORATION, 1, 2, 3; BURDEN OF PROOF, 4; CONTRIBUTORY NEGLIGENCE, 1, 2, 3, 4.

NEGOTIABLE INSTRUMENT:

1. ATTORNEY FEE CLAUSE: DESTROYS NEGOTIABILITY. The insertion of a stipulation for payment of a reasonable attorney fee in a promissory note, destroys its negotiability, and renders it subject to all defenses which the maker had against the original payee, even in the hands of an innocent purchaser for value. *Garretson v. Purdy*, 178.

NEW MATTER—IN PLEADING. SEE COUNTER CLAIM, 1.

NORTHERN PACIFIC—LAND GRANT. SEE LAND GRANT, 1, 2.

NOTICE—TO SETTLERS ON R. R. LANDS. SEE LAND GRANT, 4; SEE MUNICIPAL CORPORATION, 4; CONVERSION, 1.

OFFICERS—SEE CAPITAL COMMISSION, 5.

PARTIES—SEE QUO WARRANTO, 3, 4, 5; MANDAMUS, 1, 2.

PAYMENT:

1. COLLATERAL SECURITY: NOT PAYMENT. The giving of security, either by mortgage or trust deed, was not a payment of the note, nor is it a defense in an action brought on the note, only so far as the security may have been paid to the holder of the note. *Star Wagon Co. v. Matthiesen*, 233.

SEE BURDEN OF PROOF, 3.

PERJURY:

1. CONSTRUCTION: 8 C. 5421, U. S. REV. STATS.: FALSE PRE-EMPTION PROOF. The false writing specified in the third clause of section 5421, U. S. Rev. Stats., includes one false in respect to the facts embodied therein, as well as one falsely made and forged. *United States v. Spaulding*, 85.
2. SAME: "CLAIM" DEFINED: The word "claim" therein used includes the claim to exercise the right of pre-emption, and the claim to thereby acquire from the United States government title to the public lands. *Id.*

PLEADING:

1. AMENDMENT: MANNER OF. An amended pleading takes the place of the pleading amended, and the original drops out of and ceases to be a part of the record. The mode of amending pleadings recognized by our practice, is by rewriting the pleading, leaving out such allegations, and inserting such other allegations as may be desired, so that all the parts of the pleading shall be in one instrument, complete in itself.
2. SAME: IRREGULARITY IN MODE OF. A mere irregularity in the mode of amending a pleading, which does not affect the substantial rights of the parties in the case, and to which the attention of the District Court was not called, cannot be taken advantage of for the first time upon appeal. *Caledonia Gold Mining Co. v. Noonan*, 189.

SEE INDICTMENT, 1; QUO WARRANTO, 3, 4, 5, 6; COUNTER CLAIM, 1; ESTOPPEL, 1; LIBEL, 1.

POSSESSION—SEE SALE, 1, 2.

POWER OF SALE—SEE FORECLOSURE, 1.

PRACTICE:

1. DEMURRER: GOOD CAUSE OF ACTION AS TO ONE OF SEVERAL DEFENDANTS. Where the complaint, in an action to reform and foreclose a mortgage against several defendants, states a good cause of action against any one of such defendants, a general demurrer by all the defendants should be overruled. *Campbell v. Wambole*, 184.

2. CANNOT TRY CAUSE ANEW. Under the practice act of this territory now in force, this court in this case is empowered to correct the errors occurring in the District Court, but cannot try the case anew upon the evidence. *Caledonia Gold Mining Co. v. Noonan*, 189.

SEE CHALLENGE TO JUROR, 1; EXCEPTIONS, 1, 2, 3, 4, 5; COUNTER CLAIM, 1; CHARGING JURY, 1; VERDICT, 1, 2, 3, 4, 5, 6, 7; EXEMPTIONS, 3, 4; ASSIGNMENT OF ERROR, 1.

PRE-EMPTION—SEE PERJURY, 2; FORGERY, 1, 2; LAND GRANT, 1, 2, 3, 4.

PREMEDITATED DESIGN—SEE MALICE, 1.

PRESUMPTION—FROM USE OF DEADLY WEAPON. SEE HOMICIDE, 1; REASONABLE DOUBT, 1.

PROBATE JUDGE—SEE MANDAMUS, 4.

PROMISSORY NOTE—SEE NEGOTIABLE INSTRUMENT, 1.

QUO WARRANTO:

1. QUO WARRANTO: FORM ABOLISHED: JURISDICTION AND POWER OF COURT NOT CHANGED. In actions to attain remedies formerly reached by the writ of *quo warranto* and informations in the nature of *quo warranto*, the old form of the proceedings is abolished, but the jurisdiction and power of the courts and the right to reach through them the remedies which that writ or information once afforded, are not touched or charged by the provisions of the code. *Territory ex rel. Peterson v. Hauxhurst*, 205.
2. SAME: RULES OF EVIDENCE: PRESUMPTIONS: LAW AND FACT. The position of the defendant, the rules of evidence and the presumptions of law and fact are the same as in the proceeding by writ or information, for which the remedy by action was substituted. *Id.*
3. PLEADING: TITLE OF ACTION. The title to the complaint is in these words: "The Territory of Dakota ex rel. Peter O. Peterson, plaintiffs, v. James Hauxhurst, defendant"—held, the proper form in which to entitle the action *Id.*
4. SAME: ALLEGATIONS OF COMPLAINT: SUFFICIENT TO MAKE A PARTY PLAINTIFF. The allegations of the complaint being: "Peter O. Peterson, one of the above named plaintiffs alleges," etc., etc., "wherefore plaintiffs allege that plaintiff, Peter O. Peterson," etc.—held, that the relator, Peterson, was made a party plaintiff by the allegations in the body of the complaint. *Id.*
5. SAME: COMPLAINT MUST SHOW RELATOR ENTITLED TO OFFICE. When the action is not brought by the District Attorney in the name of the Territory, upon his own information, to oust a person from a public office illegally held, but by a relator claiming to be one of the parties plaintiff and to have an interest in the question, it must appear from the facts alleged in the complaint that the relator is entitled to the office in controversy. *Id.*
6. COMPLAINT: SUFFICIENCY OF: ESSENTIAL ALLEGATIONS: FORM GIVEN. The complaint showing that plaintiff received a greater number of legal votes than defendant, and was entitled to the office, being obliged to institute legal proceedings to obtain possession thereof, was sufficient without an allegation of demand of possession of the office or an allegation of qualification therefor. Form of complaint given. *Id.*

RAILROAD LANDS—EXEMPTION FROM TAXATION. SEE TAXATION, 1.

REASONABLE DOUBT:

1. DOCTRINE OF HOW APPLIED. The doctrine of reasonable doubt should be applied to the whole proofs and the whole case. Then the proofs and presumptions and inferences arising therefrom, are all taken into account. *U. S. v. Crow Dog*, 106.

SEE BURDEN OF PROOF, 2.

REGISTER OF DEEDS—SEE TERM OF OFFICE, 1.

REPLEVIN—SEE CLAIM AND DELIVERY.

REPLY—SEE COUNTER CLAIM, 1.

RESERVATION—SEE JURISDICTION, 1, 2; INDIAN RESERVATION, 1, 2, 3; TREATY, 1, 2.

SALE:

1. OF MERCHANDISE: CHANGE OF POSSESSION: VENDOR EMPLOYED AS SALESMAN: NOT PER SE EVIDENCE OF FRAUD. After the sale of goods, and an actual and notorious change of possession, the employment of the vendor in the capacity of mere salesman or clerk, is not *per se* conclusive evidence of fraud. *Grady v. Baker*, 296.

2. VENDEE: MAY BE IN POSSESSION BY AGENT: VENDOR MAY BE SUCH AGENT. The vendee, under section 2024 of the Civil Code of this territory, need not remain in personal possession, but may be so by agent; and such agent may be the seller of the property, "if the possession be such as to advise the creditors of the change in the title of the property." *Id.*

SELF-DEFENSE—SEE THREATS, 1, 2; BURDEN OF PROOF, 1, 2.

SETTING ASIDE VERDICT—SEE VERDICT, 3, 5, 7.

SETTLERS—RIGHTS OF. SEE LAND GRANT, 1, 2, 3, 4.

SIOUX TREATY—SEE TREATY, 1, 2.

SPECIAL VERDICT—SEE VERDICT, 2.

STATUTE OF LIMITATIONS:

1. AFFECTS REMEDY: GOVERNED BY LEX FORI. Suits brought to enforce contracts, either in the state where they were made or in the courts of other states, are subject to the remedies of the *forum* in which the suit is, including that of the statute of limitations. *Star Wagon Co. v. Matthiessen*, 233.

2. SAME: NO ISSUE. In this case the statute of limitations had not commenced to run in this territory, and there was no fact in reference to the same to be submitted to the jury. *Id.*

STOPPAGE IN TRANSIT:

1. RIGHT OF: MAY EXIST WHEN GOODS IN WAREHOUSE. The delivery by the vendor of goods sold, to a carrier who is to carry on account of the vendee,

is a constructive delivery to the vendee, but the vendor has a right, if unpaid, and the vendee be insolvent, to re-take the goods before they are actually delivered to the vendee. They are still in transit, though lying in a warehouse to which they have been sent by the vendor on the purchaser's order. *Powell v. McKechnie*, 319.

TAXATION:

1. EXEMPTION FROM. It was within the power of the legislature of the Territory of Minnesota to exempt railroad lands from taxation until sold and conveyed by the railroad company. And such a provision in the charter of an incorporation constitutes a contract which cannot be impaired by subsequent legislation. *Winona & St. P. R. R. C. v. The County of Deuel*, 1.
2. SAME: DIVISION OF TERRITORY. And the subsequent division of the Territory of Minnesota does not forfeit or affect such contract rights of the corporation as to taxation of lands situated in that part of the territory incorporated into the Territory of Dakota. *Id.*

TENDER—SEE ATTORNEY'S FEE, 1.

TERM OF OFFICE:

1. REGISTER OF DEEDS: DOES NOT HOLD OVER: DISTINCTION: DEMAND. A register of deeds does not hold over his term "until his successor shall be elected and qualified," as is the case with some officials, and the incumbent is a usurper if he attempts to hold over; his possession is unlawful, without color of right, and no previous demand of the office is necessary to maintain an action to oust him. *Territory ex rel. v. Haurhurst*, 205.

TOWN-SITE ACT—SEE MANDAMUS, 4.

TRIAL—SEE PRACTICE, 2.

THREATS:

1. ———. Communicated threats serve to put a man upon his guard to protect himself. But a bare fear or apprehension arising solely from previous threats, affords no excuse, unless at the time of the killing some effort, movement or overt act was being made by the party killed to carry such previous threats into execution, and a necessity, real or apparent, existed at the time, for the killing to prevent the accomplishment of such previous threats; and if defendant committed the first aggressive act he cannot claim the benefit of the law of self-defense. *United States v. Knowlton*, 58.
2. APPREHENSION: REASONABLE GROUNDS OF: WHO TO JUDGE OF. The jury who try the cause, and not the party who kills, are to review and judge of the reasonable grounds of his apprehension and of the imminency of the danger. *Id.*

SEE EVIDENCE, 1; CONFESSIONS, 1; MALICE, 2.

TREASURER—SEE MANDAMUS, 8.

TREATY:

1. **SIoux TREATY: HAS FORCE OF LAW, WITHOUT LEGISLATIVE ENACTMENT.** The treaty of February 24, 1869, with the Brule Sioux band of Indians, as affirmed by the agreement of February 28, 1877, operated of itself without the aid of any legislative enactment, and is equal in vigor and strength to an act of Congress. *United States v. Crow Dog*, 106.
2. **SAME: BRULE SIOUX: EXCEPTED OUT OF GENERAL PROVISIONS OF SECTION 2145.** The treaty and agreement take these Indians out of the exceptions contained in section 2145, Revised Statutes of the United States, and confer upon the District Courts jurisdiction of crimes committed by one Indian against another upon their reservation. *Id.*

TRESPASS:

1. **TRESPASS: RIGHT OF WAY: STOCK MAY GO UPON.** In this territory the owner has a license to allow his cattle to run at large upon all lands, except cultivated or meadow lands, or young timber. *Williams v. N. P. R. R. Co.*, 168.

USURY:

1. **USURIOUS CONTRACT: INTEREST CANNOT BE RECOVERED.** Two promissory notes were executed upon a loan of \$3,000, of \$1,500 each, payable in six and twelve months, with interest at 12 per cent. after due, and four other notes were given for the interest to accrue upon the first two notes before due at the rate of 2 per cent. per month, payable at the end of each three months, respectively, with exchange—*held*, that this being one entire transaction, all the notes were usurious, and the fact that the contract was separated into these parts did not relieve it of its usurious character—*held further*, that the taint of usury affected the whole and every part of it, the interest accruing upon the two notes given for principal, after maturity, as well as that accruing before, and that allowing the plaintiff to recover such interest was error. *Wood v. Cuthbertson*, 328.
2. **ILLEGAL INTEREST PAID: WHEN A COUNTER CLAIM.** Section 1100, of the Civil Code of Dakota, declaring all interest upon a usurious contract forfeited, and providing that the excess paid over 12 per cent. may be recovered from the person taking it, does not give the right to maintain a counter claim by reason of such forfeiture, for the whole interest in an action to collect the principal. Only the excess over 12 per cent., and when illegal interest has been stipulated for and not paid, then only the principal without interest, can be recovered. *Id.*
3. **CONTRACT TO PAY INTEREST ON UNPAID INTEREST, VALID.** A promissory note providing for the payment of interest annually, and stipulating that each annual installment of interest not paid when due, should bear interest at a specified rate from the time it fell due till paid—*held*, valid and legal. *Hovey v. Edmison*, 449.

VENDOR—SEE STOPPAGE IN TRANSIT, 1.

VENUE—SEE CHANGE OF VENUE, 1.

VERDICT:

1. DIRECTING VERDICT: ON EVIDENCE: COURT MAY. Before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the judge—not literally whether there is no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. There being no sufficient evidence in this case to warrant a verdict for the defendant upon the issue, it was not error for the court to direct a verdict for plaintiff. *Star Wagon Co. v. Matthiessen*, 233.
2. SPECIAL VERDICTS: DIRECTING: IN DISCRETION OF COURT. The court may, in its discretion, instruct the jury, if they find a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. But when the charge of the court fully covers all the issues in the case, it is not error to refuse to instruct the jury to find specifically upon certain issues. *Moline Plow Co. v. Gilbert*, 239.
3. EVIDENCE CONFLICTING: COURT WILL NOT DISTURB. Where there is a substantial conflict of evidence, and the evidence is sufficient to sustain the findings of the jury, the verdict will not be disturbed in this court. *Id.*
4. QUESTION OF FACT: VERDICT FINAL AS TO: EVIDENCE SUFFICIENT. When questions of fact have been fairly and fully submitted to a jury, under proper instructions, the verdict is final so far as this court is concerned, there being competent evidence to sustain it. *Bates v. Callender*, 256.
5. SETTING ASIDE VERDICT: WHEN. This court has decided that neither the verdict of a jury, nor the findings of a court upon a question of fact should be disturbed, when the evidence is conflicting, and they will not be unless great injustice seems to have been done, or there is an entire want of evidence to sustain the verdict or the finding. *Territory v. N. P. R. R. Co.*, 270.
6. SAME. But it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether, on all the evidence the preponderating weight is in his favor—that is the business of the jury—but whether, conceding to all the evidence offered the greatest probative force, which, according to the law of evidence, it is fairly entitled to, it is or is not sufficient to justify a verdict. If it is not sufficient, then it is the duty of the court, after a verdict, to set it aside and grant a new trial. *Id.*
7. SEMBLE: DIRECTING VERDICT. Where the judge is clear of doubt that a verdict ought to be rendered either for plaintiff or defendant, and that it would be his duty to set a contrary one aside, he ought to instruct the jury so to find. Such a direction cannot properly be given to the jury unless the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly. *Id.*
8. EXCESSIVE DAMAGES: SETTING ASIDE VERDICT ON ACCOUNT OF: NOT SET ASIDE, WHEN. The verdict of a jury giving damages for personal injuries should not be disturbed unless it is clear that the damages are materially greater than the evidence will justify. *Larson v. Grand Forks*, 307.

SEE CONTRIBUTORY NEGLIGENCE, 1.

WAHPETON AND SISSETON—SEE LAND GRANT, 1, 2.

WAIVER—SEE INSURANCE, 1, 2, 3.

WARRANTY:

1. ANCESTOR'S DEED: BINDS HEIRS. One who sells personal property as his own thereby warrants that he has a good and unincumbered title thereto, and the heirs of a decedent cannot be heard, for the purpose of defeating their ancestor's deed, to say that he did not in fact own the property described in the deed, or that it belonged to a third party by whose deed it was conveyed to and became the property of the ancestor subsequently to the ancestor's deed. *Myrick v. Bill*, 284.

WIFE, INCOMPETENT AS WITNESS, WHEN—SEE EVIDENCE, 3, 4, 5.

WITNESS—WIFE AS. SEE EVIDENCE, 3, 4, 5; CREDIBILITY, 1, 2.

Ex. L. B.

2. 1000, pages 96-98; matter complete

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